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Volume 1

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Revised rules, Special Sub-
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**MINISTRY OF THE
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DISPOSITION WITHOUT TRIAL

RULE 21 DEFAULT PROCEEDINGS

NOTING DEFAULT

21.01 (1) Where a defendant fails to deliver his statement of defence within the time for doing so, the plaintiff may, upon filing proof of service of the statement of claim, require the registrar to note the default of the defendant.

(2) Where the statement of defence of a defendant has been struck out,

(a) without leave to deliver another; or

(b) with leave to deliver another, and the defendant has failed to deliver another within the time allowed,

the plaintiff may, upon filing a copy of the order striking out the statement of defence, require the registrar to note the default of the defendant.

(3) Where the plaintiff has failed to require the registrar to note the default of a defendant, any other defendant who has delivered a statement of defence and wishes to set the action down for trial may, on notice to the plaintiff, bring a motion for an order requiring the registrar to note the default of the other defendant.

RULE 21 DEFAULT JUDGMENT21.01 (1)

- Language redrafted (L.R.)

21.01 (2)

- L.R.

21.01 (3)

- Correction: "apply for leave to require the noting of such default" changed to "bring a motion for an order requiring the Registrar to note the default of the other Defendant". New language would seem to be more accurate.

DISPOSITION WITHOUT TRIAL

RULE 21 DEFAULT PROCEEDINGS

21.01 Noting Default

(1) Where a defendant fails to deliver his Statement of Defence and the time for so doing has expired, the plaintiff may, upon filing proof of service of the Statement of Claim, require the registrar to note the default of such defendant.

(2) Where the Statement of Defence of a defendant has been struck out without leave to deliver another, or with leave to do so and the defendant has failed to deliver another within the time allowed, the plaintiff may require the registrar to note the default of such defendant upon filing a copy of the order striking out the Statement of Defence.

(3) Where the plaintiff has failed to require the registrar to note a defendant in default, any other defendant who has delivered a Statement of Defence and wishes to set the action down for trial may, on notice to the plaintiff, apply for leave to require the noting of such default.

(4) A defendant may deliver his statement of defence at any time until he has been noted in default under this rule.

CONSEQUENCES OF NOTING DEFAULT

21.02 (1) A defendant who has been noted in default,

(a) shall be deemed to admit the truth of all allegations of fact made in the statement of claim; and

(b) shall not deliver a statement of defence or take any other step in the proceeding, unless with leave of the court or the consent of the plaintiff, other than a motion to set aside the noting of default against him or any judgment obtained against him by reason of his default.

21.01 (4)

- L.R.

- COURTS ADMINISTRATION BRANCH.

Rule does not now provide a time limit for noting default. Working Group. This omission by Williston Committee was deliberate on ground that it served little purpose, it necessitates an application to the Court and 21.04 (2) (a) (i) & (ii) and 21.04 (3) provide protection to a Defendant.

21.02 (1) (a)

- Initial caps removed.

21.02 (1) (b)

- Addition of words "the noting of default against him". Necessary because 21.03 permits such an application by a Defendant who has been noted in default.

(4) Until a defendant has been noted in default, he shall be entitled to deliver his Statement of Defence.

21.02 Consequences of Noting Default

(1) A defendant who has been noted in default,

(a) shall be deemed to admit the truth of all allegations of fact made in the Statement of Claim; and

(b) shall not deliver a Statement of Defence or take any other step in the proceeding, without leave of the court or the consent of the plaintiff, except a motion to set aside any judgment obtained against him by reason of his default.

(2) Any step in the proceeding that may be taken with the consent of a defendant may be taken without his consent if the defendant has been noted in default, and he is not entitled to notice of any step in the proceeding.

(3) A defendant who has been noted in default is not entitled to be served with any other document in the proceeding except,

(a) as provided in subrule 27.10(5) (amended pleading), 28.03(3) (counterclaim), 29.03(2) (cross-claim) or 30.13(2) (fourth party claim);

(b) where any party requires his personal attendance; or

(c) where otherwise ordered.

SETTING ASIDE THE NOTING OF DEFAULT

21.03 The noting of default may be set aside by the court at any time on such terms as are considered just.

21.02 (2) & (3)

- Williston 21.02 (2) has been divided into sub-rules.
- The "notwithstanding" language has been removed from sub-rule (2). Is this wise?
- Cross-references in sub-rule (3) have been made specific and explained in parenthesis.

21.03

- L.R.
- HAMILTON LAW ASSOCIATION
(see their comment) Working Group. Criticism as stated is confused. It has substance if one assumes that a Plaintiff had moved for judgment (after noting default) in Toronto. This raises the whole question of the allocation of jurisdiction re interlocutory motions as set out in Rule 37, and is best left to be discussed when Rule 37 is considered.

(2) Notwithstanding the provisions of any other rule, any step in the proceeding may be taken without the consent of a defendant who has been noted in default, and he shall not be entitled to notice of any step in the proceeding and need not be served with any other document therein except,

- (a) as provided in Rules 27, 28, 29 and 30; or
- (b) where any party requires his personal attendance; or
- (c) where otherwise ordered.

21.03 Setting Aside the Noting of Default

The noting of default may be set aside by the court at any time on such terms as may seem just.

BY SIGNING DEFAULT JUDGMENT

21.04 (1) Where a defendant has been noted in default,
the plaintiff may require the registrar to sign judgment
 against the defendant in respect of a claim for,

(a) a debt or liquidated demand in money,
including interest if claimed in the
statement of claim (Form 21A);

(b) the recovery of possession of land (Form 21B);

(c) the recovery of chattels (Form 21C); or

(d) foreclosure, sale or redemption of a mortgage
 (Forms 65B to 65E and 65G to 65I).

21.04 (1) (a)

- Redrafted to refer to interest.

- M. Catzman (MAC). Noted that if
pre-judgment interest is to be
recoverable on signing default
judgment, this clause (or Form
21A) should refer to it. Several
consequential amendments have been
made to pick up this point.

- 21.04 (1) (a) has been
 amended in such a way as
 to make it clear that a
 claim for pre-judgment
 interest does not destroy
 the liquidated nature of
 the claim.

- 21.04 (2) (a) (iii) has
 been added so the Registrar
 will know the amount of
 interest claimed and by
 what authority.

- 21.04 (4) is added to
 specifically allow the
 recovery of pre-judgment
 interest.

21.04 By Signing Default Judgment

(1) After the noting of default, a plaintiff may require
 the registrar to sign judgment against a defendant noted in
 default in respect of a claim for,

(a) a debt or a liquidated demand in money
 (Form 21A);

(b) the recovery of possession of land (Form 21B);

(c) the recovery of chattels (Form 21C); or

(d) foreclosure, sale or redemption of a mortgage.
 (See Forms prescribed by Rule 65).

(2) Before the signing of default judgment, there shall be filed with the registrar,

(a) an affidavit stating,

- (i) that the plaintiff is still entitled to the relief sought;
- (ii) where part of the claim has been satisfied, the part that has been satisfied; and
- (iii) where interest is claimed, the basis of the plaintiff's entitlement to interest, the rate of interest and the amount of accrued interest; and

(b) where,

- (i) the plaintiff has a solicitor of record, the certificate of his solicitor that, in his opinion, the claim comes within the class of cases for which default judgment may properly be signed; or
- (ii) the plaintiff does not have a solicitor of record, and the registrar is in doubt whether the claim comes within the class of cases for which default judgment may be properly signed, the direction of a master or local master of the Supreme Court or a judge of the county court, as the case may be.

(3) Where the claim has been partially satisfied, the default judgment shall be confined to the remainder of the claim.

21.04 (2) (a)

- Divided into sub-clauses for greater clarity.

Sub-clause (a) (iii) is an addition, see under 21.04 (1) (a) above.

21.04 (2) (b)

- MAC. Queries whether either (b) (i) or (b) (ii) is necessary. Working Group. Clause (b) (i) is analogous to present solicitors certificate required by Form 8A. A reported case has ordered costs against a solicitor for a clearly erroneous certificate. Will require solicitors to look closely at a claim before signing judgment and will provide protection to Defendants (and Registrars). Clause (b) (ii) - could delete or leave in since cases will be rare. (Is drafting layout here awkward?)

(2) Before the signing of default judgment, there shall be filed with the registrar,

- (a) an affidavit that the plaintiff is still entitled to the relief sought and, where any part of the claim has been satisfied, the part so satisfied shall be specified; and

(b) where the plaintiff is represented by a solicitor, the certificate of his solicitor that, in his opinion, the claim is one coming within the class of cases for which default judgment may properly be signed; or

(c) where the plaintiff is not represented by a solicitor, and the registrar is in doubt whether the claim is one coming within the class of cases for which default judgment may be properly signed, he shall obtain the *flat* of a master or local master of the Supreme Court or a judge of the county court, as the case may be.

(3) Where the claim has been partially satisfied, the default judgment shall be confined to the remainder of the claim.

(4) Where the statement of claim includes a claim for interest, the default judgment may include the accrued interest to the date of the judgment.

(5) Upon signing a default judgment, the registrar shall fix the costs to which the plaintiff is entitled under Tariff A against the defendant in default and shall include the costs in the judgment unless,

(a) the judgment directs a reference; or

(b) the plaintiff gives notice in writing to the registrar that he wishes his costs to be taxed,

in which case the judgment shall include costs to be determined on the reference or on taxation, as the case may be.

(6) No default judgment may be signed in favour of or against a party under disability without leave of a judge.

21.04 (4)

- New - see under 21.04 (1) (a) above.

21.04 (5)

- This is Williston Rule 21.04 (4), L.R., and with a new provision allowing Plaintiff to request taxation. Is this addition desirable? Under Tariff A Item 1 only the taxing officer has power to allow increased amount. Case law under present Rule 668 (2) allows costs on default to be taxed.

- W. C. McBride says Registrar should "tax" costs not "fix" them. Working Group. "Taxation" brings in all of the procedure under 59.08, including notices, which are inappropriate on default.

21.04 (6)

- Williston Rule 21.04(5) redrafted to require leave of a judge where a disabled person is a Plaintiff or a Defendant.

(4) Unless the default judgment directs a reference, the registrar shall, on signing the judgment, fix the costs to which the plaintiff is entitled against the defendant in default in accordance with the appropriate tariffs.

(5) No default judgment may be signed against a party under disability without the leave of a judge.

BY PROCEEDING TO TRIAL

21.05 Where a defendant is noted in default, the plaintiff shall proceed to trial in respect of a claim for,

- (a) unliquidated damages, unless the amount of the damages has been agreed upon; or
- (b) a declaration of the invalidity of a marriage.

BY MOTION FOR JUDGMENT

21.06 (1) Where a defendant is noted in default, the plaintiff may bring a motion before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed or for which the plaintiff is not required by rule 21.05 to proceed to trial.

(2) Where an action proceeds to trial, a motion for judgment on the statement of claim as against a defendant noted in default may be brought at the trial.

21.05

- L.R.
- MAC. Queries whether Divorce and FLRA should be listed here. Working Group. Since Rule 72 is meant as far as possible to codify Divorce procedure any reference to this matter should be in Rule 72. (Divorce Act requires a trial) Rule 72.19 will be redrafted to make the need to proceed to trial clear. Re FLRA - at present such cases do not have to go to trial: Motion for judgment is available, therefore no need to include it here.

21.06

- L.R.
- COURTS ADMINISTRATION deliberate omission of time limit. See 21.01 above.

21.05 By Proceeding to Trial

After the noting of default, the plaintiff shall proceed to trial in respect of any claim for,

- (a) unliquidated damages, unless the amount of the damages has been agreed upon; or
- (b) a declaration of the invalidity of a marriage.

21.06 By Motion for Judgment

(1) After the noting of default, the plaintiff may apply to a judge for judgment on the Statement of Claim as against a defendant noted in default in respect of any claim for which he has not signed default judgment or for which he is not required by Rule 21.05 to proceed to trial.

(2) Where, for any reason, an action proceeds to trial, a motion for judgment on the Statement of Claim, as against a defendant noted in default may be made at the trial.

EFFECT OF DEFAULT JUDGMENT

21.07 (1) A judgment obtained against a defendant after he has been noted in default does not prevent the plaintiff from proceeding against the same defendant for any other relief or against any other defendant for the same or any other relief.

(2) A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in his statement of claim are deemed to be admitted, unless the facts entitle him to judgment as a matter of law.

21.07

- L.R.

- Working Group. We propose that a provision be added to the Judicature Act specifically reversing the rule that a judgment against one of several persons jointly liable releases the others. Two reasons: (a) It is really a matter of substantive law, (b) The provisions in the present rules and in Williston Rules do not protect a Plaintiff who gets judgment against one jointly liable Defendant after a trial. Query if such a provision is enacted in the Judicature Act, should 21.07 (1) be retained. We suggest it should be as a "Donkey Factor" to make it clear that partial default judgment is possible.

21.07 Effect of Default Judgment

(1) Any judgment obtained against a defendant after he has been noted in default shall be without prejudice to the right of the plaintiff to proceed against the same defendant for any other relief or against any other defendant for the same or any other relief.

(2) A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in his Statement of Claim are deemed to be admitted, unless such facts entitle him to judgment as a matter of law.

SETTING ASIDE DEFAULT JUDGMENT

21.08 (1) A default judgment signed by the registrar^A may be set aside or varied by the court on such terms as are considered just.

(2) A judgment obtained on a motion for judgment on the statement of claim, either before or at the trial, may be set aside or varied by a judge on such terms as are considered just.

>

APPLICATION TO COUNTERCLAIMS, CROSS-CLAIMS
AND THIRD PARTY CLAIM

21.09 This rule applies, with necessary modifications, to counterclaims, cross-claims and third party claims, subject to rules 28.05 (default of defence to counterclaim), 29.05 (default of defence to cross-claim) and 30.06 (default of defence to third party claim).

21.08 (1)

- L.R.

21.08 (2)

- L.R.

- Williston Rule 21.08 (3) has been (temporarily) deleted. MAC suggested deletion in light of Divisional Court decision in C.I.B.C. v SHEEHAN. Working Group. A case could be made for retaining the rule given that Sheehan was a 2/1 decision of the Divisional Court only and may not have finally resolved the question.

21.09

- The cross-references have been made more specific and explained in parenthesis.

21.08 Setting Aside Default Judgment

(1) Any judgment signed by the registrar against a party noted in default may be set aside or varied by the court, upon such terms as may seem just.

(2) Any judgment obtained on a motion for judgment on the Statement of Claim, either before or at the trial, may be set aside or varied by a judge on such terms as may seem just.

(3) As a term of setting aside a default judgment, the court may, where appropriate, allow any Writ of Seizure and Sale issued pursuant to the default judgment to remain on file in the office of a sheriff, or in an office of Land Titles, pending the final disposition of the action, on condition that any proceedings to enforce the Writ of Seizure and Sale be stayed in the meantime or otherwise as the court may order.

21.09 Application to Counterclaims, Cross-Claims and Third Party Claims

Subject to the provisions of Rules 28, 29 and 30, this rule shall apply, with any necessary modification, to a counterclaim, a cross-claim or a third party claim.

RULE 22 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

22.01 (1) At any time before an action is set down for trial, the plaintiff may bring a motion for summary judgment against a defendant who has delivered his statement of defence or served a notice of motion, on the ground that,

(a) there is no defence to the action or to the whole or part of a claim in the action; or

(b) the only defence is to the amount claimed.

(2) In an urgent case, the plaintiff may bring a motion without notice for leave to serve a notice of motion for summary judgment with the statement of claim, and leave may be given where urgency is shown, subject to such directions as are considered just.

To Defendant

(3) At any time after he has delivered his statement of defence and before the action is set down for trial, a defendant may bring a motion for summary judgment against the plaintiff on the ground that there is no merit in the action or in the whole or part of a claim in the action.

RULE 22 SUMMARY JUDGMENT22.01

- L.R. and divided into 2 sub-rules.

22.01 (3)

- L.R.

RULE 22 SUMMARY JUDGMENT

22.01 Where Available

(1) To Plaintiff

(a) At any time before an action is set down for trial, the plaintiff may apply for summary judgment against a defendant who had delivered his Statement of Defence, or has served a Notice of Motion, on the ground that,

(i) there is no defence to the action, or with respect to one or more of the claims contained therein or to the whole or part of any such claim; or

(ii) the only defence is to the amount claimed.

(b) Where there is some special reason for urgency, the plaintiff may apply, without notice, for leave to serve a Notice of Motion for Summary Judgment with the Statement of Claim, and such leave may be given, subject to such directions as may seem just.

(2) To Defendant

At any time after he has delivered his Statement of Defence and before the action is set down for trial, a defendant may apply for summary judgment against the plaintiff on the ground that there is no merit in the action, or with respect to one or more claims therein, or to the whole or part of any such claim.

AFFIDAVIT EVIDENCE

22.02 (1) Before a party may be heard on a motion for summary judgment, he shall deliver his own affidavit stating,

(a) the material facts on which he intends to rely and of which he has personal knowledge; and

(b) that he knows of no material fact that has not been disclosed.

(2) Where a party does not have personal knowledge of all the material facts on which he intends to rely, he shall also deliver the affidavit of a person who has personal knowledge of the material facts that are not set out in the affidavit of the party.

(3) Where the defendant is acting in a representative capacity or where the defendant is under disability and is represented by a litigation guardian or a committee, and the defendant or his litigation guardian or a committee, as the case may be, is unable after careful inquiry to comply with the requirements of this rule, and does not feel justified in admitting the claim of the plaintiff, he may deliver an affidavit to that effect.

22.02

- L.R.

- Working Group. 22.02 (1) requires a respondent to deliver an affidavit as a condition precedent to being heard on the motion (and 22.03 (1) makes such delivery a precondition to the right to cross-examine the applicant). Allan Rock objects to this requirement. Since the Working Group is not in agreement as to whether these provisions should be retained or deleted, the opposing views are set forth for consideration by the Rules Committee

(See next page)

22.02 Affidavit Evidence

(1) Before any party may be heard on a motion for summary judgment, he shall have delivered his own affidavit setting forth all the material facts upon which he intends to rely to the extent that he has personal knowledge thereof, and in which he swears that he knows of no fact material to the motion which has not been disclosed.

(2) To the extent that any party does not have personal knowledge of the material facts upon which he intends to rely, he shall also deliver the affidavit of some other person having such knowledge.

(3) Where the defendant is acting in a representative capacity or where the defendant is under disability and is represented by a litigation guardian or a committee, and the defendant or his litigation guardian or a committee, as the case may be, after careful inquiry, is unable to comply with the requirements of this sub-rule, and does not feel justified in admitting the claim of the plaintiff, he may deliver an affidavit to that effect.

- Allan Rock. To require a respondent to on a motion for summary judgment to deliver an affidavit as a condition precedent to being heard on the motion or cross-examining the applicant is a radical departure from the universal principle that the onus to prove entitlement must be borne by the person seeking relief. To depart from that principle in this context - where the applicant is seeking ultimate disposition in a summary fashion - is especially startling. Litigation remains an adversarial process. Litigants will remain entitled only to the relief they can prove is due - not to what is due as determined by the Court on free inquiry as agent for "fairness" at large. As in any other aspect of the process, if the applicant cannot succeed in establishing entitlement on his own material, he should not prevail. It may be that discovery will provide an opportunity to elicit further facts which are material to such a motion. Quite apart from that consideration, a more practical concern is that the requirement of an affidavit assures the generation of paper and delay since no litigant will be able to resist obtaining a further record and witness statements. Finally, it must be observed that if the respondent is silent, he will find the Court unwilling to reject uncontroverted or unchallenged evidence relied upon by the applicant. The process will, in that sense, regulate itself by imposing that penalty on a silent respondent. To require the affidavit in all cases takes away an important right and the responsibility to conduct one's own litigation.

Garry Watson. The contrary arguments are as follows. So far as concerned the respondent's position is the requirement of filing an affidavit is analogous to the existing specially endorsed writ procedure by which the defendant (who is essentially the type of person A. Rock is concerned about) must deliver an affidavit of merits and be subject to cross-examination thereon. The new requirement that he must file his own affidavit avoids the abusive practice of the defendant delivering an affidavit of merits made by a third person in order to himself avoid cross-examination. The theory underlying the new procedure is that a motion for summary judgment should not be a "cat and mouse" game (e.g. can the plaintiff make out his case in face of the defendant's silence?).

Rather the Court should decide the issue on full material after hearing what actual evidence there is to support each party's position. Removal of the requirement that each side file his own affidavit may simply have the effect of delaying all motions for summary judgment until after discovery.

Perhaps there is a middle ground. If the present requirement that a party file affidavit material is deleted, I believe a provision similar to one found in the U.S. Federal Rules should be included (Rule 22 is modelled, in part, on U.S. Federal Rule 56). The provision would be, roughly, as follows:

Where a motion for summary judgment is made and supported by affidavit as provided in this rule, a respondent may not rest upon the mere allegations or denial of his pleading, but he must set forth by affidavit specific facts showing there is a genuine issue for trial, and if he does not do so summary judgment, if appropriate, shall be entered against him.

The full text of the analogous U.S. Federal Rule (and the comments of their Rule's Committee as to the reason for an amendment to that rule in 1963) is as follows.

Rule 56

(c) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(b) *Notes on Amendments in 1963 to Rule 56(a)*

The 1963 amendment added the last two sentences to present Rule 56(b). The Advisory Committee's Notes on the alteration read as follows:

"The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device.

A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or introduces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositions, conclusions, or ultimate.

• • • • •

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule.

• • • • •

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

"The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the relevancy matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

N.B.

CROSS-EXAMINATION

22.03 (1) A party to a motion for summary judgment who has delivered his own affidavit and every other affidavit on which he intends to rely may cross-examine the deponent of any affidavit delivered by the opposite party.

(2) Where a party has cross-examined under subrule (1), he shall not deliver any additional affidavit for use on the hearing of the motion without leave or consent, and such leave may be granted where the court is satisfied that he ought to be permitted to respond by affidavit to any matter raised on the cross-examination.

(3) The right to cross-examine under subrule (1) shall be exercised with reasonable diligence and the court may refuse an adjournment of the motion for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

22.03

- L.R. Is omission of "on behalf of" in 22.03 (1) O.K.?

22.03 Cross-Examination

(1) Any party to a motion for summary judgment, who has delivered his own affidavit and the affidavit of every other person upon which he intends to rely, may cross-examine the deponent of any affidavit delivered by or on behalf of the opposite party.

(2) Where a party has cross-examined under paragraph (1), he shall not deliver any additional affidavit for use on the hearing of the motion without leave or consent; and such leave may be granted where the court is satisfied that he ought to be permitted to respond by affidavit to any matter raised on the cross-examination.

(3) The right to cross-examine under paragraph (1) shall be exercised with reasonable diligence, and the court may refuse an adjournment of the motion for the purpose of cross-examination where the party seeking the adjournment has failed to do so.

DISPOSITION OF MOTION

Where No Defence or Merit to Action

22.04 (1) Where the party bringing the motion satisfies the court that there is no defence or no merit, as the case may be, to the whole or part of a claim in the action, and that he is entitled to judgment as a matter of law, the court may grant judgment.

Where Only Defence is to the Amount Claimed

(2) Where the plaintiff satisfies the court that the only defence is to the amount claimed, the court may [^]direct a trial of that issue or a reference to determine the amount.

Where Only Issue is a Question of Law

(3) Where the court is satisfied that the only issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is before a master or local master, he may adjourn the motion for the purpose of having it determined by a judge.

Where Only Claim is for an Accounting

(4) Where the plaintiff claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference.

22.04

- L.R.

22.04 Disposition of Motion

(1) *Where No Defence or Merit to Action*

Where the applicant satisfies the court that there is no defence or merit to the action, as the case may be, or with respect to any particular claim or any part thereof, and that the applicant is entitled to judgment as a matter of law, the court may grant judgment.

(2) *Where Only Defence is to the Amount Claimed*

Where the plaintiff satisfies the court that the only defence is to the amount claimed, the court may either direct a trial of that issue or a reference to determine that amount.

(3) *Where Only Issue is a Question of Law*

Where the court is satisfied that the only issue is a question of law, the court may determine that question and grant judgment accordingly; provided, however, that where the motion is before a master or local master, he may adjourn the motion to a judge.

(4) *Where Only Claim is for an Accounting*

Where the only claim is for an accounting and the defendant fails to satisfy the court that there is some preliminary issue to be tried, the court may grant judgment with a reference.

WHERE A TRIAL IS NECESSARY

22.05 (1) Where summary judgment is refused or is granted in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and may order that the action proceed to trial by being,

- (a) placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
- (b) set down in the normal course, or within a specified time, for trial.

22.05 (1)

- L.R.

- MAC queries the reason for, and practical efficiency of, an order for trial within a specific time. Working Group. The order will be that the action be set down within a specified time, not tried within a specified time. The speedy trial concept is a crucial aspect of the summary judgment rule since many defendants who resist S.J. are not really interested in a trial (and will often settle on the eve of trial) but what they seek is the delay inherent in proceeding to trial in the normal way. These defendants can be thwarted by the Court directing a speedy trial. (All courts are required to keep a separate list of case for speedy trial: 47.09). When it becomes known that the Court will order a speedy trial in these cases many of these defendants will settle, or not resist summary judgment because "beating" S.J. will no longer gain them 1-2 years to pay. Gaining the co-operation of the Chief Judge to ensure that, at least for the first year or two, that judges are made available for speedy trials is essential to the effectiveness of this provision.

- Courts Administration. Separate lists for speedy trial will require extra work in court offices. Working Group. Extra work is justified by the policy being pursued by this provision.

22.05 Where a Trial is Necessary

(1) Where summary judgment is refused, or is granted in part only, and a trial is necessary, the court may make an order specifying what material facts, if any, are not in dispute, and defining the remaining issues, unless such issues are sufficiently defined by the pleadings, and may order that the action proceed to trial by being,

- (a) placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
- (b) set down for trial in the normal course, or within a specified time.

(2) Where an action is ordered to proceed to trial, in whole or in part, the court may impose such terms as are considered just, including an order,

- (a) for the payment into court of the whole or any part of the claim;
- (b) for security for costs; and
- (c) that the scope of examinations for discovery be limited to matters not covered by the affidavits filed on the motion and any cross-examinations thereon, and that such affidavits and cross-examinations be used in addition to or instead of examinations for discovery.

(3) Where a party fails to comply with an order for payment into court or for security for costs, the opposite party may bring a motion for an order dismissing the action or striking out the statement of defence, as the case may be.

(4) A plaintiff may combine with a motion under subrule (3) a motion for judgment and, where the statement of defence is struck out, the defendant shall be deemed to be noted in default and the court may grant judgment in respect of any claim for relief which is not required by rule 21.05 to be set down for trial.

(5) Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of a claim in the action or in a counterclaim, cross-claim or third party claim, the court may so order upon such terms as are considered just.

22.05 (2)

- L.R.
- MAC queries how, absent consent to the parties, the courts can force cross-examination on affidavits as a substitute for discovery. Working Group. Obviously an order can and should only be made after discussion with counsel, and will be tailored to what counsel say must still be covered in discovery.

22.05 (3) & (4)

- Williston 22.05 (3) has been divided into 2 sub-rules and substantially redrafted.

22.05 (5)

- Williston 22.05 (4), L.R.

(2) Where an action is ordered to proceed to trial, in whole or in part, the court may impose such terms and conditions as may seem just including an order,

- (a) for the payment into court of the whole or any part of the claim, and in addition thereto or in lieu thereof, an order for security for costs.
- (b) that the scope of examinations for discovery be limited to matters not covered by the affidavits filed on the motion and any cross-examinations thereon, and that such affidavits and cross-examinations be used in addition to or in lieu of examinations for discovery.

(3) Where any party fails to comply with an order for payment into court or for security for costs, the opposite party may apply to the court for an order dismissing the action or striking out the Statement of Defence, as the case may be, with or without costs as may seem just. Where on such a motion the Statement of Defence is struck out, the defendant shall be deemed to be noted in default, and the plaintiff may also move for judgment in respect of any claim for relief for which he is not required by Rule 21.05 to set the action down for trial.

(4) Where it appears that the enforcement of any summary judgment ought to be stayed pending the determination of any claim in the action or in any counterclaim, cross-claim or third party claim, the court may so order upon such terms as may seem just.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

Where Motion Fails

22.06 (1) Where a party who brings a motion for summary judgment obtains no relief and the action as originally constituted is allowed to proceed to trial without the imposition of terms or conditions, and unless the court is satisfied that the motion, although unsuccessful, was justified, the court shall fix the costs of the opposite party on the motion and order the party bringing the motion to pay the costs forthwith.

22.06 (1)

- L.R.
- MAC queries whether the cost sanction in this rule is not too much of a deterrent to use of S.J. Working Group. Unlike the present S.J. rule, this rule is not by its terms limited to any classes of cases - it is a wide open rule. For many types of cases the procedure will be of little assistance. It is a "strong" rule and its use should be restricted to appropriate cases (e.g. where it is clear that there is no defence or claim, where the defence is so shadowy that terms are appropriate or a speedy trial should be ordered). The rule will be a curse, not a blessing, if improperly used - hence the cost sanction to force counsel to think carefully before using it.

22.06 (2)

- Substantially redrafted. Judge Borins suggested that there may be a conflict between Williston Rule 22.06(2) and the requirement in 22.02(1) that a party must file an affidavit in order to be heard. Working Group. There is some conflict, and we feel that the rule will be more useful if it extends to all action or conduct on the motion, not just to the filing of affidavits, e.g. it would now catch a party who delays cross-examination etc.

22.06 Cost Sanctions for Improper Use of Rule

(1) Where Motion Fails

Where, on a motion for summary judgment, the applicant obtains no relief and the action as originally constituted is allowed to proceed to trial without the imposition of terms or conditions, the court shall fix the costs of the opposite party and order the applicant to pay those costs forthwith unless the court is satisfied that the motion, although unsuccessful, was nevertheless justified.

(2) Where Affidavit Filed in Bad Faith

Where it appears to the court that any affidavit filed on a motion under this rule was filed in bad faith or solely for the purpose of delay, the court may fix the costs of the opposite party and order the party filing the affidavit to pay those costs forthwith.

Where A Party Has Acted In Bad Faith

(2) Where it appears to the court that a party to a motion for summary judgment has acted in bad faith or solely for the purpose of delay, the court may fix the costs of the motion and order the party [^]to pay the costs forthwith.

EFFECT OF SUMMARY JUDGMENT

22.07 Where a plaintiff obtains summary judgment, ^{he} may proceed against the same defendant for any other relief or against any other defendant for the same or any other relief.

SETTING ASIDE SUMMARY JUDGMENT

22.08 A summary judgment obtained against a party who failed to deliver an affidavit in opposition to the motion for summary judgment or to attend on the hearing of the motion may be set aside or varied by the court on such terms as are considered just if,

- (a) the motion to set aside or vary the judgment is made without undue delay;
- (b) the failure is satisfactorily explained; and
- (c) the court is satisfied that the judgment ought to be set aside or varied.

APPLICATION TO COUNTERCLAIMS, CROSS-CLAIMS AND THIRD PARTY CLAIMS

22.09 This rule applies, with necessary modifications, to counterclaims, cross-claims and third party claims.

22.07

- L.R.
- Working Group. Same issue arises here as was raised re 21.07(1) as to whether this provision is necessary if a Judicature Act provision reversing the joint liability rule is enacted. See above.

22.08

- New
- Advocates Society pointed out that the Williston Committee's earlier published working draft provided a specific rule re setting aside S.J. where the respondent has "defaulted" on the motion, and this provision had been omitted from the final Williston Rules. They commented that the rule was necessary because no other rule re setting aside judgment "in default" would apply to such S.J. Working Group agrees. 22.08 is based on the original working draft provision and is modelled after 54.01 (3) re setting aside a judgment at trial obtained where the defendant failed to attend.

22.09

- Williston Rule 22.08, L.R. the "subject to" clause would appear to be unnecessary since it simply lists the counterclaim, cross-claim and third party claim rules, which are what would require the "necessary modifications".

22.07 Effect of Summary Judgment

Where a plaintiff obtains summary judgment under this rule, such judgment shall be without prejudice to his right to proceed against the same defendant for any other relief or against any other defendant for the same or any other relief.

22.08 Application to Counterclaims, Cross-Claims and Third Party Claims

Subject to the provisions of Rules 28, 29 and 30, this rule shall apply, with any necessary modification, to a counterclaim, a cross-claim or a third party claim.

RULE 23 DETERMINATION OF A QUESTION OF LAW

WHERE AVAILABLE

23.01 (1) A party may, at any time before the action is set down for trial, bring a motion before a judge,

- (a) for the determination, before trial, of a question of law raised by a pleading in the action where the determination of the question may dispose of the action, shorten the trial or result in a substantial saving of costs;
- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence; or
- (c) for judgment upon an admission of fact in the pleadings, in the examination of any other party or in answer to a notice to admit (check this name later).

(2) No evidence is admissible on a motion under clause (1)(a) or (1)(b) without leave of a judge.

RULE 23 DETERMINATION OF QUESTION OF LAW

23.01(1)

- L.R.

- Working Group

Query whether this provision is not a duplication of the summary judgment rule, or would be more appropriately included in the summary judgment rule, since such motions usually turn on the nature and ambit of the admission rather than on a question of law. However, inclusion in the summary judgment rule would complicate that rule. Recommendation is to leave it here in Rule 23. Allan Rock favours inclusion in Rule 22 but exempt applicant from the requirement of filing an affidavit.

23.01(2)

- A redraft of Williston Rule 23.02 and modelled after N.S.14.25, U.K.18/19/2 and B.C.19(24). The Williston Rule was too broad in that it implied the documentary evidence could be admitted under 23.01(1)(a) and (b) without leave. The revised rule codifies the existing practice under Rule 124 and 126.

RULE 23 DETERMINATION OF A QUESTION OF LAW

23.01 Where Available

(1) The plaintiff or a defendant may, at any time before the action is set down for trial, apply to a judge,

- (a) for the determination, prior to trial, of any question of law raised by any pleading in the action where the determination of that question may either dispose of the action, shorten the trial, or result in a substantial saving of costs;
- (b) to strike out any pleading on the ground that it discloses no reasonable cause of action or defence; or
- (c) for judgment upon any admission of fact in the pleadings, in the examination of any other party or in answer to a Notice to Admit.

23.02 No Evidence Admissible Without Leave

No evidence, other than a transcript of any relevant examination, shall be admissible on a motion under Rule 23.01 (1) without leave of the judge, except for such affidavits as are necessary to identify any document or prove its execution.

(3) A defendant may, at any time before the action is set down for trial, bring a motion before a judge to have the action stayed or dismissed on the ground that,

- (a) the court is without jurisdiction to try the action;
- (b) the plaintiff is without legal capacity to commence or continue the action;
- (c) another proceeding is pending in Ontario or another jurisdiction between the same parties and in respect of the same subject-matter; or
- (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court.

23.01(3)

- L.R.

- Clause (c) "claim" changed to "subject matter" as former language possibly more restrictive than the case law on lis alibi pendens.

Williston Rule 23.03

- deleted as no longer necessary if Judicature Act includes a provision abolishing the joint liability rule. Also not necessary here as a "donkey factor".

(2) A defendant may, at any time before the action is set down for trial, apply to a judge to have the action stayed or dismissed on the ground that,

- (a) the court is without jurisdiction to try the action;
- (b) the plaintiff is without legal capacity to commence or continue the action;
- (c) another action is pending in the same or another jurisdiction between the same parties and in respect of the same claim; or
- (d) the action is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the court.

23.03 Effect of Judgment under This Rule

Where a plaintiff obtains judgment under this rule, such judgment shall be without prejudice to his right to proceed against the same defendant for any other relief, or against any other defendant for the same or any other relief unless the judge otherwise orders.

RULE 24 SPECIAL CASERULE 24 SPECIAL CASERULE 24 STATED CASE

- Name of procedure changed to "Special" rather than "Stated" case to avoid confusion with statutory stated case for the opinion of the Divisional Court.
- TONY BRIDGES (see his comment) raises the question of the need for rules of procedure applicable to statutory stated cases. Working Group. We should consider a special rule later (e.g. a new rule immediately following Rule 69) re stated case under statute.

24.01 (1)

- L.R.
- MAC. Suggests the rule should apply to applications as well as to "actions". Working Group. This rule should be limited to actions because on an application the parties can in effect state a special case without following this, different, procedure. However, 24.04 (removal to Court of Appeal) should be changed from "action" to proceeding.
- ALLAN ROCK raises whether the term "issues" could be used throughout this rule rather than "questions" since it is often easier to frame an issue than a question.

WHERE AVAILABLE

24.01 (1) Where the parties to an action concur in stating one or more questions (issues) of law in the form of a special case for the opinion of the court, any party may bring a motion before a judge for leave to set the special case down for hearing.

24.01 Where Available

(1) Where the parties to an action concur in stating one or more questions of law, in the form of a stated case, for the opinion of the court, any party may apply to a judge for leave to set the stated case down for hearing.

(2) [^]Leave may [^]be granted where the judge is satisfied that the determination of the questions will either dispose of the action or facilitate the determination of the matters in issue.

FORM OF SPECIAL CASE

24.02 A special case shall set out concisely the facts agreed upon between the parties and refer to any documents that are necessary to enable the judge to determine the questions stated and shall be signed by the parties or their solicitors (Form 24A).

HEARING OF SPECIAL CASE

24.03 (1) Upon the hearing of a special case, the entire contents of any of the documents referred to therein may be read, and the judge may draw any inference from the facts and the documents that might have been drawn [^]if they had been proved at a trial.

(2) Where the parties have agreed upon the specific relief to be granted on the determination of the questions of law [^], and where the agreement has been set out in the special case, the judge may, on the determination of the questions, grant judgment accordingly.

24.01 (2)

- L. R. Word "only" deleted as unnecessary.

24.02

- L.R.
- Minor changes are proposed to Form 24A

24.03

- L. R.

(2) Such leave may only be granted where the judge is satisfied that the determination of such questions will either dispose of the action or facilitate the determination of the matters in issue.

24.02 Form of Stated Case

A stated case shall set out concisely the facts agreed upon between the parties, including such reference to any documents as may be necessary to enable the judge to determine the questions stated and shall be signed by the parties or their solicitors (Form 24A).

24.03 Hearing of Stated Case

(1) Upon the hearing of a stated case, the entire contents of any documents referred to therein may be read, and the judge may draw any inference from the facts and the documents as might have been drawn therefrom if they had been proved at a trial.

(2) Where the parties have agreed upon the specific relief to be granted on the determination of the questions of law so stated, and where that agreement has been set out in the stated case, the judge may, on the determination of such questions, grant judgment accordingly.

REMOVAL INTO COURT OF APPEAL

24.04 (1) A party to a proceeding may bring a motion before a judge of the Court of Appeal for leave to have a special case determined in the first instance by that court and the judge may grant leave where the questions of law

- (a) raise a constitutional issue;
- (b) require the interpretation of a statute;
- (c) involve the validity of a regulation; or
- (d) raise an issue in respect of which,
 - (i) there are conflicting decisions of judges of the High Court and there is no decision of an appellate court in Ontario;
 - (ii) there is a conflict between decisions of an appellate court in Ontario and an appellate court of another province, or between decisions of appellate courts of at least two other provinces; or
 - (iii) one of the parties seeks to establish that a decision of an appellate court in Ontario should not be followed.

(2) Where a judge grants leave under subrule (1), he may give directions as to the time and form in which the case is to be set down and as to the exchange and filing of statements of fact and law.

24.04 (1)

- L. R.
- "in the first instance" added to make intention of rule clearer.
- MAC . Suggested language be redrafted to make it clear Court of Appeal has discretion to refuse leave. This has been done.

24.04 (2)

- New. Added to provide the procedure before the Court of Appeal if leave is granted.
- Working Group. The analogous provision today to Rule 24 i.e. J.A. s35, permits a judge at trial to refer the case before him to the Court of Appeal. Rule 24 does not seem to envisage this. Is this any loss?

24.04 Removal into Court of Appeal

Any party to an action may apply to a judge of the Court of Appeal for leave to have a stated case determined by that court where the questions of law so stated,

- (a) raise a constitutional issue;
- (b) require the interpretation of a statute;
- (c) question the validity of a regulation purporting to have been made pursuant to statutory authority; or
- (d) raise an issue in respect of which,
 - (i) there are conflicting decisions of judges of the High Court and there is no decision of an appellate court in Ontario;
 - (ii) there is a conflict between a decision of an appellate court in Ontario and that of an appellate court of another province or between decisions of appellate courts of at least two other provinces; or
 - (iii) one of the parties will seek to establish that a previous decision of an appellate court in Ontario should not be followed.

RULE 25 DISCONTINUANCE AND WITHDRAWAL

DISCONTINUANCE BY PLAINTIFF

25.01 (1) A plaintiff may discontinue his action against any defendant, either in whole or in part,

(a) before the close of pleadings, by serving upon all parties who have been served with the statement of claim a notice of discontinuance (Form 25A) and filing the notice with proof of service;

(b) after the close of pleadings, by obtaining leave of the court; or

(c) at any time, by filing the consent in writing of all parties.

(2) Where a party to an action is under a disability, the action may be discontinued in respect of that party only with leave of the court and on notice to the Official Guardian, unless the Public Trustee is committee of the estate of the party in which case the notice shall be to the Public Trustee.

EFFECT OF DISCONTINUANCE ON COUNTERCLAIM

25.02 Where an action is discontinued against a defendant who has counterclaimed, he may deliver within thirty days after the discontinuance a notice of election to proceed with his counterclaim (Form 25B), and in default of such election, the conterclaim shall be deemed to be discontinued without costs.

RULE 25 DISCONTINUANCE AND WITHDRAWAL

- For clarity this rule has been reorganized. Discontinuance and its consequences is dealt with first and then Withdrawal.

25.01 (1)

- Williston Rule 25.01; L.R.

25.01 (2)

- New in response to L. Perry's submission so that position of persons under disability is not prejudiced. Should it read "Where any party....?"

25.02

- Williston Rule 25.04: L.R. The Legislative Draftsman is converting all numbers from numerals to words. Is this desirable?

RULE 25 DISCONTINUANCE AND WITHDRAWAL

25.01 Discontinuance by Plaintiff

A plaintiff may discontinue his action against any defendant, either in whole or in part,

(a) at any time before the close of pleadings, by serving upon all parties who have been served with the Statement of Claim, a Notice of Discontinuance (Form 25A) and filing the notice with proof of service;

(b) after the close of pleadings, by obtaining leave of the court; or

(c) at any time, by filing the consent in writing of all parties.

25.04 Effect of Discontinuance on Counterclaim

Where an action is discontinued against a defendant who has counterclaimed, he may, within 30 days thereafter, deliver a Notice of Election (Form 25C) to proceed with his counterclaim. In default of such election, the counterclaim shall be deemed to be discontinued without costs.

EFFECT OF DISCONTINUANCE ON ^ACROSS-CLAIM
OR THIRD PARTY CLAIM

25.03 Where an action is discontinued against a defendant who has commenced a cross-claim or third party claim, the cross-claim or third party claim shall be deemed to be dismissed with costs payable by the plaintiff, unless the court orders otherwise.

EFFECT OF DISCONTINUANCE ON SUBSEQUENT ACTION

25.04 (1) The discontinuance of an action in whole or in part is not a defence to a subsequent action, unless otherwise agreed by the parties or provided by the order giving leave to discontinue.

(2) Where an action in respect of the same subject-matter as a discontinued action is subsequently brought before payment of the costs of the discontinued action, the court may order a stay of the subsequent action until the costs have been paid.

25.03

- Williston Rule 25.05: L.R.

25.04

- Williston Rule 25.06: L.R.

25.05 Effect of Discontinuance on any Cross-Claim or
Third Party Claim

Where an action is discontinued against a defendant who has commenced a cross-claim or third party claim, the cross-claim or third party claim shall be deemed to be dismissed with costs payable by the plaintiff, unless the court otherwise orders.

25.06 Effect on Subsequent Action

(1) The discontinuance of an action in whole or in part shall not be a defence to a subsequent action, unless otherwise provided by the order giving leave to discontinue or by the consent filed.

(2) Where a subsequent action in respect of the same subject matter is brought before payment of the costs of a discontinued action, the court may order a stay of the subsequent action until those costs have been paid.

WITHDRAWAL BY DEFENDANT

25.05 (1) A defendant may withdraw all or part of his statement of defence with respect to any plaintiff at any time by delivering to all parties a notice of withdrawal of defence (Form 25C), but where the defendant has commenced a [^] cross-claim or third party claim, leave to withdraw must be obtained from the court.

(2) Where a defendant withdraws the whole of his statement of defence, [^] he shall be deemed to have been noted in default.

25.05 (1)

- Williston Rule 25.02 (1): L.R.
- The need to obtain leave has been restricted to circumstances where it is the withdrawing Defendant who has commenced a cross-claim or third party claim. Working Group. Leave is not necessary where a Defendant other than the withdrawing Defendant has cross-claimed etc. since the withdrawing Defendant remains a party to the action and to the cross-claim etc. The only situation (and reason) for court intervention is where the withdrawing Defendant has himself commenced a cross-claim or third party claim - the withdrawal of his defence may prejudice the third party or cross-claimant where they have not contested the Defendant's liability to the Plaintiff, and will need an extension of time to do so. Where the withdrawing Defendant has counterclaimed there appears to be no reason for requiring leave.

25.05 (2)

- Williston Rule 25.02 (2): L.R.

25.02 Withdrawal by Defendant

(1) A defendant may withdraw his Statement of Defence, or any part of his defence, with respect to any plaintiff at any time by delivering to all parties a Notice of Withdrawal (Form 25B); provided that, where there is a counterclaim, cross-claim or third party claim, leave to withdraw must be obtained from the court.

(2) Where a defendant wholly withdraws his Statement of Defence under this rule, he shall be deemed to have been noted in default.

COSTS OF DISCONTINUANCE OR WITHDRAWAL

25.06 (1) A plaintiff who discontinues the whole of an action shall pay the costs of the action including any cross-claim, and the costs of any third party claim, unless the court orders or the parties consent otherwise.

(2) A defendant who withdraws the whole of his statement of defence shall pay the costs of the plaintiff, unless the court orders or the parties consent otherwise.

APPLICATION TO COUNTERCLAIM, CROSS-CLAIM AND THIRD PARTY CLAIM

25.07 This rule applies, with necessary modifications, to counterclaims, cross-claims and third party claims.

25.06 (1) & (2)

- Williston Rule 25.03 has been divided into 2 sub-rules for clarity.
- Sub-rule (1) has been worded in such a way as to permit, where appropriate, the direct payment by the Plaintiff of the third party's costs.
- Sub-rule (2) Williston Rule 25.03 would have made a Defendant liable for the costs of cross-claims and third party claims. This has been deleted because this rule deals only with the withdrawal of his defence to the main action: discontinuance of any cross-claim or third party claim made by him is a separate matter and governed by 25.07.

25.07

- L.R. Cross reference to other rules deleted as unnecessary.

GENERAL

- At present discontinuance and dismissal for want of prosecution of motions, applications and appeals are not comprehensively dealt with in the Williston Rules. Later, the Working Group will propose changes to rules 38, 59.07, and 62.10 to deal with this matter.

25.03 Costs on Discontinuance or Withdrawal

A party wholly discontinuing an action or wholly withdrawing his Statement of Defence against another party shall pay the costs of the other party to date, including the costs of any cross-claim or third party claim, unless otherwise ordered by the court, or the parties otherwise consent.

25.07 Application to Counterclaim, Cross-Claim and Third Party Claim

Subject to the provisions of Rules 28, 29 and 30, this rule shall apply, with any necessary modification, to a counterclaim, a cross-claim or a third party claim.

Rule 26 has been considered by the Working Group, but a draft rule has not been received from Legislative Counsel:

RULE 26 DISMISSAL OF ACTION FOR WANT OF PROSECUTION

WHERE AVAILABLE

26.01 A defendant who is not in default under these rules or an order of the court may bring a motion to have an action dismissed for want of prosecution where the plaintiff has failed,

- (a) to serve his statement of claim on all the defendants within the permitted time;
- (b) to note in default any defendant who has failed to deliver his statement of defence, within thirty days after the default;
- (c) to set the action down for trial within six months after the close of pleadings; or
- (d) to bring a motion for leave to restore to the trial list an action which has been struck off the trial list, within thirty days after the action was struck off.

NOTICE WHERE PLAINTIFF UNDER DISABILITY

26.02 Where the plaintiff is under a disability, notice of a motion to dismiss the action for want of prosecution shall be served on the Official Guardian, unless the Public Trustee is committee of the estate of the plaintiff, in which case the notice shall be served on the Public Trustee.

EFFECT OF DISMISSAL ON COUNTERCLAIM

26.03 Where the court dismisses an action for want of prosecution as against a defendant who has counterclaimed, the court may grant leave to the defendant to proceed with his counterclaim.

RULE 26 DISMISSAL FOR WANT OF PROSECUTION

26.01 (1)

- L.R.

26.02 (2)

- New in response to L. Perry's comment re need for notice to O.G. or P.T. in such cases.

26.03

- Williston Rule 26.02, substantially redrafted.
- MAC queries why in the Discontinuance Rule where the Plaintiff discontinues the Defendant must elect to proceed with the counterclaim, whereas where the action is dismissed for want of prosecution the Williston rule provides that it is without prejudice to his right to proceed unless otherwise ordered. He suggests a consistent approach should be taken to this question. Working Group. The different approach is deliberate. Where an action has been dismissed for want of prosecution a Defendant should not have the right to elect to proceed, because he will usually have been "sitting" on his counterclaim as long as the Plaintiff has been sitting. Indeed we feel that the rule should be recast to provide that, on a dismissal for want of prosecution, the court may grant leave to continue a counterclaim where appropriate. The revised rule incorporates this proposed change.

RULE 26 DISMISSAL OF ACTION FOR WANT OF PROSECUTION

26.01 Where Available

Any defendant who is not himself in default under these rules, or under any order of the court, may apply to have an action dismissed for want of prosecution where the plaintiff has failed,

- (a) to serve his Statement of Claim on all the defendants within the time limited for so doing;
- (b) to note in default any defendant for failure to deliver his Statement of Defence, within 30 days after such default;
- (c) to set the action down for trial within six months after the close of pleadings; or
- (d) to apply to the court for leave to restore to a list for trial any action which has been struck off a list for trial, within 30 days thereafter.

26.02 Effect of Dismissal on Counterclaim

The dismissal of an action for want of prosecution shall be without prejudice to the right of the defendant to proceed with his counterclaim, unless the court otherwise orders.

26.03 Effect of Dismissal on Cross-Claim or Third Party Claim

Where an action is dismissed for want of prosecution, any cross-claim or third party claim shall be deemed to be dismissed, with costs payable by the plaintiff, unless the court otherwise orders.

EFFECT OF DISMISSAL ON CROSS-CLAIM OR THIRD PARTY CLAIM

26.04 Where an action is dismissed for want of prosecution, as against a defendant who has commenced a cross-claim or third party claim, those claims shall be deemed to be dismissed, with costs payable by the plaintiff, unless the court orders otherwise.

EFFECT ON SUBSEQUENT ACTION

26.05(1) The dismissal of an action for want of prosecution is not a defence to a subsequent action unless otherwise provided in the order dismissing the action.

(2) Where a subsequent action in respect of the same subject matter is brought before payment of the costs of an action dismissed for want of prosecution, the court may order a stay of the subsequent action until the costs have been paid.

FAILURE TO SET ACTION DOWN FOR TRIAL WITHIN ONE YEAR

26.06(1) Every registrar shall maintain a list of all actions commenced in his office in which a statement of defence has been filed and which have not been set down for trial or terminated.

(2) When an action has been on the list for one year, the registrar shall mail to the solicitors of record or, where there is no solicitor of record, to the party, a notice of status hearing (Form 26A) to be held before a judge, at least sixty days before the date fixed for the hearing.

26.04

- Williston Rule 26.03 redrafted. Working Group. The Williston provision assumes that an action will be dismissed as against all Defendants. While rare, dismissal may only be as to one of several Defendants. Hence it is only the cross-claim, etc., commenced by the Defendant against whom the main action is dismissed that should be dismissed under this rule.

26.05

- Williston Rule 26.04; L.R.

26.06

- Williston Rule 26.05 with some substantial redrafting.
- Sub-rule (1), L.R.
- Sub-rule (2), L.R. Now provides hearing is to be before a judge. Is this appropriate?
- Sub-rule (3). Williston sub-rule (3) has been divided into 2 sub-rules. MAC queries why notices has to be given to the client. Working Group. Notice to the client here is important because too many lawyers do not keep clients accurately informed as to the progress of the action and the instance of this is probably highest among cases which are proceeding slowly. The rule intends that the client should be personally notified (a) of the status of the action; and (b) that a status hearing will be held at which he is invited to attend.
- Sub-rule (4). Williston sub-rule (3), second sentence - now made into a new sub-rule, L.R.
- Sub-rule (5). Williston sub-rule (4). Redrafted (a) to give it a little more teeth (burden placed on Plaintiff) and (b) to encourage the court to specify not only the

26.04 Effect on Subsequent Action

(1) The dismissal of an action for want of prosecution shall not be a defence to a subsequent action unless otherwise provided in the order dismissing the action.

(2) Where a subsequent action in respect of the same subject matter is brought before payment of the costs of an action dismissed for want of prosecution, the court may order a stay of the subsequent action until those costs have been paid.

26.05 Failure to Set Action Down for Trial Within One Year

(1) Every registrar shall maintain a list of all actions in which, after the coming into force of these rules, a Statement of Defence is filed in his office. An action shall only be removed from that list when the action has been set down for trial or terminated.

(2) When an action has been on the list for one year, the registrar shall mail to the solicitors of record, or, where there is no solicitor of record, to the party, a Notice of Status Hearing (Form 26A) at least 60 days before the date fixed for the hearing.

(3) Unless the action has been set down for trial or terminated before the date fixed for the status hearing, the solicitors of record shall attend and the parties may attend on the hearing.

(4) Where a party represented by a solicitor does not attend at the hearing, his solicitor shall file proof that a copy of the notice was served on the party.

(5) On the status hearing, the plaintiff shall show cause why the action should not be dismissed and if the judge is satisfied that the action should proceed he may set time periods for the completion of remaining steps necessary to set the action down for trial and may order that the action be set down for trial within a time limit specified in the order.

(6) Unless the action is set down for trial within the time limit so ordered, or it is terminated in the meantime, the registrar shall dismiss the action for want of prosecution.

APPLICATION TO COUNTERCLAIM, CROSS-CLAIM AND THIRD PARTY CLAIM

26.07 This Rule applies, with any necessary modifications, to counterclaims, ~~cross~~ cross-claims and third party claims.

date by which action is to be set down, but also to set up a timetable to achieve that goal.

- Sub-rule (6). Williston sub-rule (5).
- Courts Administration points out this procedure will increase the court office workload. Working Group. A desirable reform which justifies the increased workload.
- John Morrissey opposes the status hearing procedure on the ground that the pace of litigation should be a matter for the parties and not the court. Working Group. Williston Committee's policy decision in favour of this procedure is sound. The court should see that litigation proceeds with reasonable diligence. In many cases the parties are concerned with the slow speed of litigation, which is often not controlled by the them but by their legal advisors. Nova Scotia has a similar procedure (N.S. 28.11) but the relevant period is 6 months rather than 1 year.
- Garry Watson suggested two changes to Form 26A. Working Group. We agree with the changes.
- Working Group. Since this rule is concerned with the time limits within which an action must be set down for trial, we believe it would be preferable if it formed part of Rule 47 Setting Down For Trial. It will be more visible there particularly since the profession rarely uses the want of prosecution rule.

26.07

- This rule has been redrafted to exclude the cross-references.

(3) Unless the action has been set down for trial or terminated before the date fixed for the hearing, the solicitors of record shall attend and the parties may attend on the hearing. Where a party represented by a solicitor does not attend, the solicitor shall, on the hearing, file proof that a copy of the notice was served on his client.

(4) On the status hearing, the judge shall order the action to be set down for trial within a time limit specified in the order, or he may adjourn the hearing to a fixed date or make such other order as may seem just.

(5) Unless the action is set down for trial within the time limit so ordered, or it is terminated in the meantime, the registrar shall dismiss the action for want of prosecution.

26.06 Application to Counterclaim, Cross-Claim and Third Party Claim

Subject to the provisions of Rules 28, 29 and 30, this rule shall apply, with any necessary modification, to a counterclaim, a cross-claim or a third party claim.

PLEADINGS

RULE 27 PLEADINGS

PLEADINGS REQUIRED OR PERMITTED

27.01 (1) In an action, pleadings shall consist of the statement of claim ^(Forms 16A or 16C) and a statement of defence ^(Form 20A) and may include a reply (Form 27A).

(2) In a counterclaim, pleadings shall consist of the counterclaim (Form 28A) and a defence to counterclaim (Form 28B) and may include a reply to defence to counterclaim (Form 28C).

(3) In a cross-claim, pleadings shall consist of the cross-claim (Form 29A) and a defence to cross-claim (Form 29B) and may include a reply to defence to cross-claim (Form 29C).

(4) In a third party claim, pleadings shall consist of the Third Party Claim (Form 30A) and a Third Party Defence (Form 30B) and may include a reply to Third Party Defence (Form 30C).

(5) No reply that amounts merely to a joinder of issue shall be delivered, but where a party does not deliver a reply within the prescribed time, he shall be deemed to deny every material allegation of fact made in the previous pleading of the opposite party.

(6) No pleading subsequent to a reply shall be delivered without the consent in writing of the opposite party or by leave of the court.

RULE 27 PLEADINGS

27.01

- The purpose of this provision is to catalogue the various pleadings that are required or permitted, and form numbers are given. The Williston rule 27.01 (a) was not exhaustive re form numbers (e.g. no forms were indicated in 27.01 (1) re Statement of Claim and Statement of Defence) and (b) counterclaims, cross-claims and third party claims were all given 27 form numbers. This was in line with the Williston Committee policy of giving a form number only once - the first time the documents was referred to. Working Group feels it would make more sense (a) if all pleadings were given form numbers in this rule (rather than only some) and (b) counterclaims, cross-claims and third party claims should be given 28, 29 and 30 form numbers respectively (i.e. the numbers of the relevant rules) and the form numbers should appear both in Rule 27.01 and in the relevant "substantive" rule.

- MAC criticized the inclusion of the word "specifically" (in the context of "specifically denies") in several forms. Working Group. We agree the word should be deleted.

PLEADINGS

RULE 27 PLEADINGS

27.01 Pleadings Required or Permitted

(1) In an action, pleadings shall consist of the Statement of Claim and a Statement of Defence and may include a Reply (Form 27A).

(2) In a counterclaim, pleadings shall consist of the Counterclaim (Form 27B), and a Defence to Counterclaim (Form 27C) and may include a Reply to Defence to Counterclaim (Form 27D).

(3) In a cross-claim, pleadings shall consist of the Cross-Claim (Form 27E) and a Defence to Cross-Claim (Form 27F) and may include a Reply to Defence to Cross-Claim (Form 27G).

(4) In a third party claim, pleadings shall consist of the Third Party Claim (Form 27H) and a Third Party Defence (Form 27I) and may include a Reply to Third Party Defence (Form 27J).

(5) No reply which merely amounts to a joinder of issue shall be delivered. If a reply is not delivered within the time limited for the delivery thereof, there shall be an implied joinder of issue which shall operate as a denial of every material allegation of fact made in the previous pleading of the opposite party.

(6) No pleading subsequent to a reply shall be delivered without the consent in writing of the opposite party or by leave of the court.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

132 HILLISTON'S PROPOSED RULES

ADDITIONAL REQUIREMENTS

27.02 Pleadings shall be divided into paragraphs numbered consecutively, and each allegation shall be contained in a separate paragraph, so far as is practicable.

SERVICE OF PLEADINGS

Who is to be Served

27.03 (1) Every pleading shall be served on the opposite party and on every other person who is, at the time of service, a party to the action or to a counterclaim, cross-claim or third party claim in the action.

Service on Added Parties

(2) Where a person is added as a party to an action by an order of the court, or is made a party to a counterclaim or to a third party claim in the action, the party adding him shall serve on the added party a copy of all the pleadings previously delivered in the action or in any counterclaim, cross-claim or third party claim in the action.

Where Personal Service Not Required

(3) Where a pleading is an originating process and is required to be served on a party, other than an opposite party, the service may be made in any manner set out in rules 18.02 to 18.07.

TIME FOR DELIVERY OF PLEADINGS

27.04 (1) The time for delivery of a statement of claim is prescribed by rule 16.07.

27.02

- L.R.

27.03

- L.R.

27.02 Additional Requirements

Pleadings shall be divided into paragraphs numbered consecutively, and each allegation so far as is practicable shall be contained in a separate paragraph.

27.03 Service of Pleadings

(1) Who is to be Served

Every pleading shall be served on the opposite party and upon every other person who is, at the time of such service, a party to the action or to any counterclaim, cross-claim or third party claim in the action.

(2) Service on Added Parties

Where a person is added as a party to an action by an order of the court, or is made a party to a counterclaim or to a third party claim in the action, it shall be the responsibility of the party adding him to serve upon the added party a copy of all the pleadings previously delivered in the action or in any counterclaim, cross-claim or third party claim in the action.

(3) Where Personal Service Not Required

Where a pleading is an originating process and is required to be served on a party, other than an opposite party, personal service is not required.

(2) The time for delivery of a statement of defence is prescribed by rule 20.01.

(3) A reply shall be delivered within ten days after service of the statement of defence [except where the defendant counterclaims in which case a reply and defence to counterclaim shall be delivered within twenty days of the service of the statement of defence and counterclaim.]

(4) The time for delivery of pleadings in a counterclaim is prescribed by rule 28.

(5) The time for delivery of pleadings in a cross-claim is prescribed by rule 29.

(6) The time for delivery of pleadings in a third party claim is prescribed by rule 30.

CLOSE OF PLEADINGS

27.05 Pleadings are closed on the noting of the defendant in default, on the delivery of the reply or when the time for delivery of the reply has expired.

RULES OF PLEADING - APPLICABLE TO ALL PLEADINGS

Material Facts

27.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for his claim or defence, but not the evidence by which those facts are to be proved.

27.04

- L.R.

- 27.04 (3). In his comment to 28.04 MAC suggested the time for delivering a defence to a counterclaim should be 20, rather than 10 days.

Working Group. We agree and to give effect to this 27.04 (3) needs to be qualified as indicated in the revised rule.

27.05

- L.R.

27.04 Time for Delivery of Pleadings

(1) The time for delivery of a Statement of Claim is prescribed by Rule 16.07.

(2) The time for delivery of a Statement of Defence is prescribed by Rule 20.01.

(3) A Reply shall be delivered within 10 days after service of the Statement of Defence.

(4) The time for delivery of pleadings in a counterclaim is prescribed by Rule 28.

(5) The time for delivery of pleadings in a cross-claim is prescribed by Rule 29.

(6) The time for delivery of pleadings in a third party claim is prescribed in Rule 30.

27.05 Close of Pleadings

Pleadings are deemed to be closed upon the noting of the defendant in default, or upon the delivery of the Reply or when the time for delivery thereof has expired.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

134 WILLISTON'S PROPOSED RULES

Pleading Law

(2) A party may raise any point of law in his pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Facts Presumed unless Denied

(3) A party need not plead any fact that is presumed by law to be true or as to which the burden of proof lies on the opposite party unless the opposite party has denied it in his pleading.

Condition Precedent

(4) A party need not plead the performance or occurrence of a condition precedent to the assertion of his claim or defence unless the opposite party has denied it in his pleading.

Inconsistent Pleading

(5) A party may plead inconsistent allegations where the pleading makes it clear that such allegations are being pleaded in the alternative, but an allegation in a reply that is inconsistent with an allegation made in the statement of claim or that raises a new claim may be pleaded only by way of amendment to the statement of claim.

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

27.06

- 27.06 (3) redrafted in response to MAC's comment.

27.06 Rules of Pleading - Applicable to All Pleadings

(1) Material Facts

Every pleading shall contain a concise statement of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved.

(2) Pleading Law

A party may raise any point of law in his pleading. Conclusions of law may be pleaded provided that the material facts supporting such conclusions are pleaded.

(3) Facts Presumed unless Denied

Unless the opposite party has specifically denied it in his pleading, a party need not plead any fact which is presumed by law to be true or where the burden of disproving it lies on the opposite party.

(4) Condition Precedent

Unless the opposite party has specifically denied it in his pleading, a party need not plead the performance or occurrence of a condition precedent to the assertion of his claim or defence.

(5) Inconsistent Pleading

(a) A party may plead inconsistent allegations, provided the pleading makes it clear that such allegations are being pleaded in the alternative.

(b) No allegation in a Reply shall be inconsistent with an allegation made in the Statement of Claim or raise a new claim. Such an allegation may only be pleaded by way of amendment to the Statement of Claim.

Contract or Agreement

(7) Where it is material to allege that a contract or relationship is to be implied from a series of letters or conversations or from any other circumstances, it is sufficient to allege the contract or relationship as a fact.

Documents or Conversations

(8) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation shall not be pleaded unless those words are themselves material. [^]

Nature of Act or Condition of Mind

(9) Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, ^x but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Claim for Relief

(10) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount shall be stated; and

(b) particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but further particulars shall be delivered forthwith after they become available and, in any event, not less than ten days before trial.

- 27.06 (7) "relationship" added in response to MAC's comment.
- 27.06 (8): the second sentence of Williston rule removed in response to MAC's comment. As it stands is the revised rule too "tight"? Compare Ontario Rule 149. Nova Scotia Rule 14.08 says "need not be pleaded".

(6) Notice

Where notice to any person is alleged, it is sufficient to allege such notice as a fact unless the form or precise terms of the notice is or are material.

(7) Contract or Agreement

Where it is material to allege that a contract or agreement is to be implied from a series of letters or conversations or from any other circumstances, it is sufficient to allege the contract or agreement as a fact.

(8) Documents or Conversations

The effect of any document or the purport of any conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation shall not be pleaded unless those words are themselves material. Where a document is the basis of a claim or defence, a copy of such document or the material parts thereof may be attached as a schedule to the pleading.

(9) Nature of Act or Condition of Mind

Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars thereof; but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which the same is to be inferred.

(10) Claim for Relief

Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, when damages are claimed, the amount shall be stated. Particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but further particulars shall be delivered forthwith after they become available and, in any event, not less than 10 days before trial.

Subsequent Facts

(11) A party may plead a fact that has occurred after the commencement of the action, and where the fact must be pleaded in a pleading that was delivered before the fact occurred, the pleading may be amended with leave of the court, and the leave may be given, upon such terms as are considered just, where the amendment will permit the convenient administration of justice and notwithstanding that the new fact may give rise to a new claim or defence.

RULES OF PLEADING - APPLICABLE
TO DEFENCE AND REPLY

Admissions and Denials

27.07 (1) A party, in his defence or reply, shall specifically admit every allegation of fact in the pleading of the opposite party that he does not dispute and, subject to subrule (5), all allegations of fact that are not denied either generally or specifically shall be deemed to be admitted unless the party pleading to an allegation alleges that he has no knowledge in respect of it.

Different Version of Facts

(2) Where a party intends to prove a different version of the facts than that pleaded by the opposite party, a mere denial of the version so pleaded is not sufficient, but the party, in his defence or reply, shall plead his own version of the facts.

- 27.06 (11). MAC questioned the need for the word "where the amendment will permit the convenient administration of justice". Working Group. Words are best left in as they point to the avoidance of a multiplicity of proceedings as being the relevant criteria c.f. the joinder rules 5.03(1) (c) and 5.03(2) (b).

27.07

- 27.07 (1). MAC questioned whether it was necessary to refer to "denied either generally or specifically". Working Group. Retain the words because it flags the fact that the general denial is still available and will avoid the deemed admission.

(11) Subsequent Facts

A party may plead any fact that has occurred since the commencement of the action and, where any such fact occurs after the delivery of his pleading, he may apply to the court for leave to deliver an amended pleading. Such leave may be granted upon such terms as may seem just where the amendment will permit the convenient administration of justice, notwithstanding that any such fact may give rise to a new claim or defence.

27.07 Rules of Pleading - Applicable to Defence and Reply

(1) Admissions and Denials

A party, in his defence or reply, shall specifically admit every allegation of fact in the pleading of the opposite party which is not disputed by him and, subject to paragraph (5), all allegations of fact which are not denied either generally or specifically shall be deemed to be admitted unless the party pleading to any such allegation alleges that he has no knowledge in respect thereof.

(2) Different Version of Facts

Where it is intended to prove a different version of the facts than that pleaded by the opposite party, a mere denial of the version so pleaded is not sufficient, but a party, in his defence or reply, shall plead his own version of the facts.

(3) Affirmative Defences

A party, in his defence or reply, shall plead any matter upon which he intends to rely to defeat the claim or defence of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue which has not been raised in any previous pleading.

Affirmative Defences

(3) A party, in his defence or reply, shall plead any matter on which he intends to rely to defeat the claim or defence of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in a previous pleading.

Effect of Denial of Contract

(4) Where a contract or agreement is alleged in a pleading, a bare denial of the contract or agreement by the opposite party shall be construed only as a denial of the making of the contract or agreement, or of the facts from which the contract or agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the contract or agreement.

Damages

(5) In an action for damages, the amount of damages shall be deemed to be in issue, unless specifically admitted.

PARTICULARS

27.08 Where a party demands better particulars of an allegation in the pleading of the opposite party, and the opposite party fails to supply them within five days, the court may, upon such terms as are considered just, order
 ^ particulars to be delivered within a specified time.
 >

27.08

- Working Group recommends that Williston Rule 27.08(2) and (3) be deleted. We believe that, if it could be done, it would be

desirable to codify the standard to be applied on a motion for particulars. However, we believe this is not possible as the standard appears to vary as between different types of cases. As a universal standard, sub-rule (2) is not accurate. Without sub-rule (2), (3) is unnecessary.

(4) Effect of Denial of Contract -

Where a contract or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial of the making of the contract or agreement alleged, or of the facts from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of the contract or agreement.

(5) Damages

In an action for damages, the amount thereof shall be deemed to be in issue, unless specifically admitted.

27.08 Particulars

(1) Where a party demands better particulars of any allegation in the pleading of the opposite party, and the opposite party fails to supply them within 5 days, the court may, upon such terms as may seem just, order such particulars to be delivered within a specified time.

(2) Particulars, for the purpose of pleading, may be ordered when the pleading in question is so vague or ambiguous that the opposite party cannot reasonably be required to frame a responsive pleading thereto.

(3) Particulars, for the purpose of trial, may be ordered after the close of pleadings where such particulars appear necessary to define the issues for trial or to avoid surprise at trial.

STRIKING OUT A PLEADING OR OTHER DOCUMENT

27.09 The court may strike out ~~a~~ a pleading or other document, or any part thereof, at any time, with or without leave to amend, and on such terms as are considered just, on the ground that such pleading or other document,

(a) may prejudice ~~a~~ or delay the fair trial of the action;

(b) is ~~a~~ frivolous or vexatious; or

(c) is an abuse of the process of the court.

AMENDMENT OF PLEADINGS

General Power of Court

27.10 (1) The court may at any stage of an action grant leave to amend a pleading and leave shall be given, on such terms as are considered just, unless prejudice will result that cannot be compensated for by costs or an adjournment.

27.09

- Working Group recommends the dropping, from the Williston Rule, of the words "expunge", "embarrass" and "scandalous" as adding nothing to the rule.

27.09 Striking Out a Pleading or Other Document

The court may strike out or expunge any pleading, or other document, or any part thereof, at any time, with or without leave to amend, and upon such terms as may seem just, on the ground that such pleading or other document,

(a) may prejudice, embarrass or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

When Amendments May be Made

- (2) A party may amend his pleading,
- (a) once, without leave, at any time before the close of pleadings, if the amendment does not include or require the addition, deletion or substitution of a party to the action;
- (b) at any time, with the written consent of all parties or leave of the court.

When Amendments May be Disallowed

- (3) Where a party has amended a pleading without the consent of all parties or leave of the court, any other party may, within ten days after service on him of the amended pleading, apply to the court to disallow the amendment or for the imposition of terms.

How Amendments Made

- (4) An amendment to a pleading,
- (a) shall be made on the face of the copy filed in the court office unless the amendment is so extensive as to make the amended pleading difficult or inconvenient to read, in which case a fresh copy of the original pleading as amended, bearing the date of the original pleading, shall be filed;
- (b) shall be underlined so as to distinguish the amended wording from the original, and the amended pleading shall be endorsed by the registrar with the date upon which, and the authority by which, the amendment was made; and
- (c) that has been amended more than once shall be underlined with an additional line for each such occasion.

Service of Amended Pleading

- (5) A Unless otherwise ordered, a copy of an amended pleading shall be served forthwith on each party to the action.

27.10 Amendment of Pleadings

(1) *General Power of Court*

The court may at any stage of an action grant leave to amend any pleading and such leave shall be given, on such terms as may seem just, unless prejudice will result which cannot be compensated for by costs or an adjournment.

(2) *When Amendments May be Made*

A party may amend any pleading filed by him,

- (a) once, without leave, at any time prior to the close of pleadings, provided that the amendment does not include or require the addition, deletion or substitution of a party or parties to the action;
- (b) at any time, with the written consent of all parties or leave of the court.

(3) *When Amendments May be Disallowed*

Where a party has amended a pleading without the consent of all parties or leave of the court, any other party may, within 10 days after service on him of the amended pleading, apply to the court to disallow the amendment or for the imposition of terms.

(4) *How Amendments Made*

- (a) An amendment to any pleading shall be made on the face of the copy filed in the court office unless the amendment is so extensive as to make the amended pleading difficult or inconvenient to read, in which case a fresh copy of the original pleading as amended and bearing the date of the original pleading, shall be filed.

(6) Where the amended pleading is an originating process, service shall be made whether or not the party has been noted in default and if the party to be served has been served with the original pleading, or has responded to it, the service may be made in any manner set out in rules 18.02 to 18.07.

(7) Proof of service of an amended pleading shall be filed forthwith after the service thereof.

Pleading to an Amended Pleading

(8) ^A Unless otherwise ordered, a party shall plead to an amended pleading within the time remaining for pleading to the original, or within ten days after delivery of the amended pleading, whichever is the longer period.

(9) Where a party has pleaded to a pleading that is subsequently amended, he shall be deemed to rely on his original pleading in answer to the amendment unless he pleads to the amended pleading within the time ~~for~~ for doing so.

Amendment at Trial

(10) Where a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless otherwise ordered.

(b) In either case, the amendment shall be underlined so as to distinguish the amended wording from the original and the amended pleading shall be endorsed by the registrar with the date upon which, and the authority by which, the amendment was made;

(c) Where any pleading is amended on more than one occasion, each subsequent amendment shall be underlined with an additional line for each such occasion.

(5) Service of Amended Pleading

(a) Unless otherwise ordered, a copy of the amended pleading shall be served forthwith upon all of the parties to the action;

(b) Where the amended pleading is an originating process, personal service is not required unless the party to be served has not been served with the original pleading, or has failed to respond thereto, in which case personal service is required whether or not he has been noted in default.

(c) Proof of service of an amended pleading shall be filed forthwith after the service thereof.

(6) Pleading to an Amended Pleading

(a) Unless otherwise ordered, a party shall plead to an amended pleading within the time remaining for pleading to the original, or within 10 days after delivery of the amended pleading, whichever is the longer period.

27.10

- 27.10 (8) Advocates Society questioned the desirability of this provision. Working Group recommends the deletion of this provision since the question of amendment after limitation periods will be dealt with in the new Limitation Act.

- (b) Where a party has pleaded to a pleading which is subsequently amended, he shall be deemed to rely on his original pleading in answer to such amendment unless he pleads to the amended pleading within the time limited for so doing.

(7) *Amendment at Trial*

Where a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless otherwise ordered.

(8) *Amendment After Limitation Period*

Notwithstanding that a relevant limitation period has expired since the commencement of the action, the court may allow an amendment,

- (a) asserting a new claim; or

- (b) adding or substituting a new party;

provided the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment.

RULE 28 COUNTERCLAIM

WHERE AVAILABLE

28.01 (1) A defendant may assert, by way of counterclaim ~~(Form 28A)~~ in the action, any right or claim that he may have against the plaintiff.

(2) Where a defendant counterclaims against a plaintiff, he may join as a defendant added by counterclaim any other person, whether a party to the action or not, who is a necessary or proper party to the counterclaim.

STATEMENT OF DEFENCE AND COUNTERCLAIM

28.02 (1) A defendant shall include his counterclaim in the same document as his statement of defence and the document shall be called a statement of defence and counterclaim (Form 28A).

(2) Where there is a defendant added by counterclaim, the statement of defence and counterclaim shall contain a second style of cause showing who is plaintiff by counterclaim and who are defendants by counterclaim.

TIME FOR DELIVERY OF STATEMENT OF DEFENCE AND COUNTERCLAIM

28.03 (1) Where a counterclaim is against the plaintiff only, the statement of defence and counterclaim shall be delivered within the time limited for the delivery of the statement of defence in the main action.

(2) Where a counterclaim is against the plaintiff and a defendant added by counterclaim, the statement of defence and counterclaim shall be issued within the time limited for

RULE 28 COUNTERCLAIMS

- Working Group recommends that the counterclaim forms (presently numbered 27B - 27D) be given 28 numbers and that reference be made to them in this rule.

28.01

- L.R.

28.02

- L.R. and form number added.

28.03

- L.R.

RULE 28 COUNTERCLAIM

28.01 Where Available

(1) A defendant may assert, by way of counterclaim in the action, any right or claim which he may have against the plaintiff.

(2) Where a defendant counterclaims against a plaintiff, he may join as an added defendant by counterclaim any other person, whether a party to the action or not, who is a necessary or proper party to the counterclaim.

28.02 Statement of Defence and Counterclaim

(1) A defendant shall plead his defence and counterclaim in one document to be called a Statement of Defence and Counterclaim.

(2) Where there is an added defendant by counterclaim, the Statement of Defence and Counterclaim shall contain a second style of cause showing who is plaintiff by counterclaim and who are the defendants by counterclaim.

28.03 Time for Delivery of Statement of Defence and Counterclaim

(1) Where a counterclaim is against the plaintiff only, the Statement of Defence and Counterclaim shall be delivered within the time limited for the delivery of the Statement of Defence in the main action.

(2) Where a counterclaim is against the plaintiff and an added defendant by counterclaim, the Statement of Defence and Counterclaim shall be issued within the time limited for delivery of the Statement of Defence in the main action, and shall be served,

- (a) on the plaintiff, within the time limited for delivery of the Statement of Defence in the main action; and

^ delivery of the statement of defence in the main action,
and shall be served,

(a) on the plaintiff, within the time limited for delivery of the statement of defence in the main action; and

(b) on the defendant added by counterclaim, together with a copy of the statement of claim in the main action, within thirty days after the statement of defence and counterclaim is issued.

(3) Service of a statement of defence and counterclaim on the plaintiff or on a defendant added by counterclaim who is a defendant to the main action may be made in any manner set out in rule 18.02 to 18.07, but if the defendant has failed to deliver a notice of intent to defend or a statement of defence in the main action, ^ service shall be made in the manner set out in rules 18.02 to 18.04, whether or not he has been noted in default in the main action.

TIME FOR DELIVERY OF DEFENCE TO COUNTERCLAIM

28.04 (1) The plaintiff shall deliver his defence to counterclaim (Form 28.04) within the time limited for the delivery of a reply, if any, in the main action, and where ^ a reply is delivered, his defence to counterclaim shall be joined thereto.

(2) A defendant added by counterclaim shall deliver his defence to counterclaim within twenty days after service of the statement of defence and counterclaim.

(b) on the added defendant by counterclaim, together with a copy of the Statement of Claim in the main action, within 30 days thereafter.

(3) Personal service of a Statement of Defence and Counterclaim is not required on the plaintiff or on an added defendant by counterclaim who is a defendant to the main action unless such defendant has failed to deliver a Notice of Intent to Defend or a Statement of Defence in the main action, in which case personal service is required, whether or not he has been noted in default in the main action.

28.04

- L.R. and form number added.

- MAC. Williston 28.04(1) would allow only 10 days for the delivery of a Statement of Defence to a counterclaim. This time should be 20 days as for any other Statement of Defence. Working Group agrees. Best solution is to allow 20 days for a reply as well where there is a counterclaim. 27.04(3) has been amended accordingly to achieve this.

28.04 Time for Delivery of Defence to Counterclaim

(1) The plaintiff shall deliver his Defence to Counterclaim within the time limited for the delivery of a Reply, if any, in the main action, and where such a Reply is delivered, his Defence to Counterclaim shall be joined thereto.

(2) An added defendant by counterclaim shall deliver his Defence to Counterclaim within 20 days after service of the Statement of Defence and Counterclaim.

>
TIME FOR DELIVERY OF REPLY TO
DEFENCE TO COUNTERCLAIM

28.05 A reply to defence to counterclaim (Form 28.05), if any, shall be delivered within ten days after delivery of the defence to counterclaim.

DISCOVERY IN RESPECT OF COUNTERCLAIM

28.06 The parties to a counterclaim who are adverse in interest are entitled to discovery from each other.

TRIAL OF COUNTERCLAIM

28.07 A counterclaim shall be tried at the trial of the main action, unless otherwise ordered.

DISPOSITION OF COUNTERCLAIM

28.08 (1) Where it appears that a counterclaim may unduly complicate or delay the trial of the main action, or cause undue prejudice to a party, the court may order separate trials or strike out the counterclaim without prejudice to the right of the defendant to assert the claim in a separate action.

(2) Where a defendant does not dispute the claim of the plaintiff in the main action, but makes a counterclaim, the court may stay the main action until the counterclaim is disposed of.

(3) Where the plaintiff does not dispute the counterclaim of a defendant, the court may stay the counterclaim until the claim is disposed of.

(4) Where both the plaintiff in the main action and the plaintiff by counterclaim succeed, either in whole or

WILLISTON 28.05

- This rule provides that where there is default to a counterclaim judgment may be obtained only on motion to a judge. Working Group. We cannot see the reasoning behind this rule. There is no such requirement today. The Defendant is just a defendant like any other defendant, so why court intervention? Where a Plaintiff defaults and desires a stay, let him move for one under Williston 28.09(3). We recommend deletion.

28.05

- Williston 28.06, L.R. and form number added.

28.06

- Williston 28.07, L.R. MAC had criticized the language and proposed a redraft. Working Group agrees with his criticism but suggests that the revised rule is an adequate form of redraft.

28.07

- Williston 28.08: no change.

28.05 Effect of Default of Defence to Counterclaim

Where a defendant by counterclaim has been noted in default in respect of the counterclaim, the plaintiff by counterclaim may only obtain judgment against him upon motion to a judge.

28.06 Time for Delivery of Reply to Defence to Counterclaim

A Reply to Defence to Counterclaim, if any, shall be delivered within 10 days after delivery of the Defence to Counterclaim.

28.07 Discovery in Respect of Counterclaim

The parties to a counterclaim who are adverse in interest are entitled to discovery, each from the other.

28.08 Trial of Counterclaim

A counterclaim shall be tried at the trial of the main action, unless otherwise ordered.

28.09 Disposition of Counterclaim

(1) Where it appears that a counterclaim may unduly complicate or delay the trial of the main action, or cause undue prejudice to any party, the court may order separate trials or strike out the counterclaim without prejudice to the right of the defendant to assert any such claim in a separate action.

(2) Where a defendant does not dispute the claim of the plaintiff in the main action, but sets up a counterclaim, the court may stay the main action until the counterclaim is disposed of.

(3) Where the plaintiff does not dispute the counterclaim of a defendant, the court may stay the counterclaim until the claim is disposed of.

(4) Where both the plaintiff in the main action and the plaintiff by counterclaim succeed, either in whole or in part, and there is a balance in favour of one of them, the court may in a proper case give judgment for the balance.

in part, and there is a balance in favour of one of them, the court may in a proper case give judgment for the balance.

APPLICATION TO COUNTERCLAIM, CROSS-CLAIM
AND THIRD PARTY CLAIM

28.09 This rule applies, with necessary modifications, to the assertion of a counterclaim by a defendant added by counterclaim, a defendant to a cross-claim or a third party.

28.08

- Williston 28.09, L.R.
- Working Group. Sub-rules (2) and (3) provide that the court may stay the main action or the counterclaim, as the case may be. (O.R. 118 and 119 similarly so provide today). Are these sub-rules sound? Generally a party should not have to wait for judgment if the claim or counterclaim is not disputed. Often a stay of execution will be appropriate, but it will be rare that the proceeding should be stayed. Perhaps the best solution would be to add to both sub-rules "or grant judgment with a stay of execution". (The caselaw under O.R. 118 seems to indicate that judgment with a stay of execution is more common today than a stay of the proceedings).

28.09

- Williston 28.10, L.R.

**28.10 Application to Counterclaim, Cross-Claim
and Third Party Claim**

The provisions of this rule shall apply, with any necessary modification, to the assertion of a counterclaim by an added defendant by counterclaim, a defendant to a cross-claim or a third party.

REVISED RULES OF CIVIL PROCEDURE

RULE 29 CROSS-CLAIM

WHERE AVAILABLE

29.01 A defendant may cross-claim (Form 29A) against a co-defendant whom he claims,

- (a) is, or may be, liable to him for all, or any part of the claim of the plaintiff; or
- (b) is, or may be, liable to him for any other relief relating to the subject-matter of the main action.

STATEMENT OF DEFENCE AND CROSS-CLAIM

29.02 A defendant shall include his cross-claim in the same document as his statement of defence and the document shall be called a statement of defence and cross-claim (Form 29A).

TIME FOR DELIVERY OF STATEMENT OF DEFENCE AND CROSS-CLAIM

29.03 (1) A statement of defence and cross-claim shall be delivered within the time limited for delivery of the statement of defence in the main action.

RULE 29 CROSS-CLAIM

- Working Group recommends that the cross-claim forms (presently numbered 27E - 27G) be given 29 numbers and that reference be made to them in this rule.

29.01

- L.R.

- Working Group. The draftsman has deleted the words "or connected with" from 29.01 (b). At least two members of the group oppose this deletion as the words appear in the rules of other jurisdictions (e.g. N.S. and U.K.) on which this rule is modelled, and because expansive language is desirable here.

- W. C. McBride suggests that the words "or maybe" should be deleted. Working Group will do some research on this point and report to the meeting on this suggestion.

- Working Group. At present where a Defendant (D1) wishes to claim contribution from a co-defendant (D2) under Section 2(1) of the Negligence Act, he does so by pleading in his Statement of Defence that D2 was partly to blame for the accident, or by expressly claiming against D2, in his Statement of Defence, contribution and indemnity under the Section. The Statement of Defence must state facts in support of the claim for contribution (query how often this is done in practice) and a copy of the pleading must be served on D2. The present procedure, well supported by caselaw is really an accommodation - some procedure had to be worked out within the present rules to allow one defendant to claim against another, short of third party proceedings. With the introduction of the cross-claim procedure, this "forced" accommodation is no longer necessary and logically the contribution claim should be asserted by cross-claim under 29.01 (a). However, existing practice may carry over unless a specific reference is made to this issue. Would

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RULE 29 CROSS-CLAIM

29.01 Where Available

A defendant may cross-claim against a co-defendant whom he claims,

- (a) is, or may be, liable to him for all, or any part of the claim of the plaintiff; or
- (b) is, or may be, liable to him for any other relief relating to, or connected with, the subject matter of the main action.

29.02 Statement of Defence and Cross-Claim

A defendant shall plead his defence and cross-claim in one document to be called a Statement of Defence and Cross-Claim.

29.03 Time for Delivery of Statement of Defence and Cross-Claim

(1) A Statement of Defence and Cross-Claim shall be delivered within the time limited for delivery of the Statement of Defence in the main action.

(2) Personal service of a Statement of Defence and Cross-Claim is not required on a defendant against whom a cross-claim is made unless he has failed to deliver a Notice of Intent to Defend or a Statement of Defence in the main action, in which case personal service is required, whether or not he has been noted in default in the main action.

(2) Service of a statement of defence and cross-claim on a defendant against whom a cross-claim is made may be made in any manner set out in rules 18.02 to 18.07 but if he has failed to deliver a notice of intent to defend or a statement of defence in the main action, service shall be made in the manner set out in rules 18.02 to 18.04, whether or not he has been noted in default in the main action.

TIME FOR DELIVERY OF DEFENCE TO CROSS-CLAIM

29.04 A defence to cross-claim (Form 29R) shall be delivered within twenty days after the delivery of the statement of defence and cross-claim.

DISPUTE OF LIABILITIES ON CROSS-CLAIM

29.05 In a defence to cross-claim, the defendant against whom the cross-claim is made may dispute the liability of the defendant making the cross-claim to the plaintiff or his own liability to the defendant, or both.

EFFECT OF DEFAULT OF DEFENCE TO CROSS-CLAIM

29.06 Where a defendant against whom a cross-claim is made has been noted in default in respect of the cross-claim, the defendant making the cross-claim may obtain judgment against him only at the trial of the main action or on motion to a judge.

it be worthwhile to add to 29.01 a new sub-rule (2) as follows?

"(2) A defendant who claims contributions [and indemnity] from a co-defendant under the Negligence Act shall do so by way of cross-claim.

Requiring a cross-claim to be used is not only logical, it may also encourage defendants to be more specific as to the allegations relied upon to support the contribution claim.

29.02

- L.R. and form number added.

29.03

- Caps removed.

29.04

- L.R. and form number added.

29.05

- New. Working Group. The Williston Committee did not include a provision in the cross-claim rule analogous to the provision in the third party rule (see 30.03) permitting a defendant (D2) against whom a cross-claim is made to dispute the liability of the cross-claiming defendant (D1) to the plaintiff. Since a cross-claim may often be designed to pass on to D2, D1's liability to the plaintiff it is necessary to give D2 the right to defend D1's liability to the plaintiff. This is the reason for the addition of 29.05. We do not think it is necessary to expressly provide (see c.f. 30.03(2)) that the validity of any judgment by the plaintiff against D1 is admitted where D2 does not dispute D1's liability to the plaintiff

29.04 Time for Delivery of Defence to Cross-Claim
A Defence to Cross-Claim shall be delivered within 20 days after the delivery of the Statement of Defence and Cross-Claim.

29.05 Effect of Default of Defence to Cross-Claim
Where a defendant against whom a cross-claim is made has been noted in default in respect of the cross-claim, the defendant making the cross-claim may only obtain judgment against him at the trial of the main action or upon motion to a judge.

29.06 Time for Delivery of Reply to Defence to Cross-Claim
A Reply to Defence to Cross-Claim, if any, shall be delivered within 10 days after delivery of the Defence to Cross-Claim.

because, since D2 is a party to the action, he will be bound anyway.

29.06

- Williston 29.05
- MAC suggested that "only" should follow the word "him". Working Group. This change should appear in the revised rule (but may not at the present time).
- 29.06 is necessary because usually the defendant's right to recover on the cross-claim will depend on him being liable to the plaintiff and it would be unwise in such cases to grant the defendant judgment on the cross-claim until he is held liable to the plaintiff.

29.07

- Williston 29.06, form number added.

29.08

- Williston 29.07, L.R.

29.09

- Williston 29.08, no change.

29.10

- Williston 29.09, L.R.
- MAC queries whether the court should be given a broader power to sever a cross-claim, along the lines of the power given in the counterclaim rule 28.09 (1). Working Group. We feel the rule as it stands gives the court adequate powers. Under 29.09 the court can order separate trials. In an extreme case 29.10 would probably authorize severance, but severance should rarely be necessary because of the tests in 29.01.

TIME FOR DELIVERY OF REPLY TO DEFENCE TO CROSS-CLAIM

29.07 A reply to defence to cross-claim (Form 29C), if any, shall be delivered within ten days after delivery of the defence to cross-claim.

DISCOVERY IN RESPECT OF CROSS-CLAIM

29.08 The parties to a cross-claim who are adverse in interest are entitled to discovery from each other.

TRIAL OF CROSS-CLAIM

29.09 The cross-claim shall be tried at the trial of the main action, unless otherwise ordered.

PREJUDICE OR DELAY TO PLAINTIFF

29.10 The plaintiff is not to be prejudiced or unnecessarily delayed by reason of a cross-claim, and he may apply to the court to impose such terms as may be necessary to prevent prejudice or delay where that may be done without injustice to the parties to the cross-claim.

APPLICATION TO COUNTERCLAIM AND THIRD PARTY CLAIM

29.11 This rule applies, with necessary modifications, to the assertion of a cross-claim by one defendant to a counterclaim against another defendant to the same counterclaim, or by one third party against another third party to the same third party claim.

29.11

- Williston 29.10, L.R.

29.07 Discovery in Respect of Cross-Claim

The parties to a cross-claim who are adverse in interest are entitled to discovery, each from the other.

29.08 Trial of Cross-Claim

The cross-claim shall be tried at the trial of the main action, unless otherwise ordered.

29.09 Prejudice or Delay to Plaintiff

The plaintiff is not to be prejudiced or unnecessarily delayed by reason of a cross-claim, and he may apply to the court to impose such terms as may be necessary to prevent such prejudice or delay where that may be done without injustice to the parties to the cross-claim.

29.10 Application to Counterclaim and Third Party Claim

The provisions of this rule shall apply, with any necessary modification, to the assertion of a cross-claim by one defendant to a counterclaim against another defendant to the same counterclaim, or by one third party against another third party to the same third party claim.

RULE 30 THIRD PARTY CLAIM

RULE 30 THIRD PARTY CLAIMS

RULE 30 THIRD PARTY CLAIM

- Working Group. As was done with the preceding rules we propose that the relevant form numbers be given 30 numbers and reference be made to them in the rule.
- As you will see there is some reorganizing of this rule. Most of this flows from our proposal that where the third party wishes to dispute the liability of the defendant to the plaintiff, he should do so, by delivering a Statement of Defence in the main action, rather than by including this dispute in the third party defence.

30.01

- L.R.

WHERE AVAILABLE

30.01 A defendant may commence a third party claim against any person who is not a party to the action who he claims,

- (a) is or may be liable to him for all or part of the claim of the plaintiff;
- (b) is or may be liable to him for any other relief relating to or connected with, the subject-matter of the main action; or
- (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

30.01 Where Available

A defendant may commence a Third Party Claim against any person who is not a party to the action, whom he claims,

- (a) is, or may be, liable to him for all or part of the claim of the plaintiff;
- (b) is, or may be, liable to him for any other relief relating to, or connected with, the subject matter of the main action; or
- (c) should be bound by the determination of some issue arising between the plaintiff and the defendant.

Ins. Bur. of Canada expressed concern that Rule 30.01 would permit an "insured" defendant to take third party proceedings against his insurer who was denying coverage. Working Group. The I.B.C. is correct in its conclusion, but this is no change in the law. Today a defendant may take third party proceedings where he claims to be entitled to, "indemnity" and liability insurance is a classic example of a contract of indemnity (the case law restricts a defendant's right to third party his insurer if there is to be a jury trial). However, there is one important situation where an insured may not third party his insurer. It is common to include in many insurance contracts "no-action" clauses prohibiting the insured from bringing an action on the contract until after judgment against the insurer. The caselaw holds that this precludes third party proceedings against an insurer who is denying coverage.

In our view such clauses should not be permitted to preclude third party proceedings. Our reasoning and recommendations are set forth in the following memorandum.

April 23rd, 1981.

TO: Sub-Committee on Proposed New Rules
FROM: Working Group

RE: "No action" clauses in Insurance Contracts
and Third Party Proceedings

1. The Problem

As a general rule an insured defendant is entitled to take third party proceedings against his insurer where the insurer denies coverage. This follows from the fact that liability insurance is a contract of indemnity: and since what the insured defendant claims is indemnity he may join the insurer as a third party (though not, according to the case law, where there will be a jury trial in the main action).

However, insurance contracts not infrequently include "no action" clauses i.e. clauses which prohibit any action against the insurer until the liability of the insured has been determined by a judgment against him. In Ontario these clauses create difficulty for an insured where his insurer denies coverage and/or refuses to defend the action (e.g. where it does not offer the insured a non-waiver agreement). The Ontario courts have held that such a clause prohibits the defendant from bringing third party proceedings against his insurer for indemnity.

2. Current Ontario Position

In Int. Formed Tubes Ltd. v Ohio Crankshaft Co. [1965]

2 O.R. 240 the Court of Appeal held that the "no action" clause was a complete bar to third party proceedings. Roach J.A. said:

For the respondent (defendant) in this appeal it has been submitted that the insurer, the third party, has repudiated the policy and therefore cannot take advantage of the clause on which it relies and which I have just quoted. What the insurer has said is simply this, that it does not propose to defend the action on behalf of its insured. That does not, of necessity, mean that the insurer has repudiated the policy. . . . Having regard to the plain language in the clause which I have quoted from the policy, it is clear that so long as the matters therein referred to as conditions precedent have not been complied with, the adding of the third party in the proceedings is not authorized. In other words, by the terms of the policy itself the parties have defined and limited their own positions.

This decision has been followed and applied in various subsequent cases: Duff v Perkins [1968] 2 O.R. 1 (Master): Clapp v Gallina [1969] 1 L.R. 344 (H.C.).

It is worth noting that earlier, in 1912, Middleton J. had refused in Pollington v Cheeseman [1912] 8 D.L.R. 142 to permit the defendant to invoke a "no action" clause to defeat third party proceedings. He stated it was

quite plain that to hold that the third party procedure did not apply, where a provision such as this is inserted in the policy, would be to frustrate one of the principal objects of the practice; the securing of one trial, and one trial only, of the issue between the plaintiff and defendant. The difficulty that existed before this practice was devised, viz., the possibility that there might be discordant findings between the tribunals called upon to pronounce between the plaintiff and defendant, and as between the defendant and the third party, was a real difficulty, and the remedy has been found most beneficial."

The true solution of the matter appeared to me to be found in recognition of the dual object of the procedure. The notice served upon the third party indicates this. He is notified, so that he may, if he wishes, dispute the plaintiff's claim against the defendant, and also that he may dispute, if he desires, his liability to indemnify the defendant; and even if it is clear that the contract with the defendant is so framed as to preclude the bringing of an action upon it before the defendant has actually paid, this does not altogether defeat the jurisdiction of the Court, and the third party procedure may well be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party.

In the Int. Formed Tubes case the Court of Appeal declined to follow Pollington (which was referred to but not discussed) stating that it preferred the reasoning of a Manitoba case Piper v Spence [1925] 1 D.L.R. 334 (K.B.). The reasoning in Piper was essentially the reasoning used in Int. Formed Tubes: i.e. the third party proceeding was in violation of the contractual term of the policy.

The result arrived at in Int. Formed Tubes, and followed by subsequent lower courts in Ontario, is contrary to the position taken in both the U.K. and the U.S. Moreover, it would appear to make little sense in light of subsequent developments in Ontario.

3. The U.K. and U.S. Position

In England the Court of Appeal in Brice v Wackerbarth [1974] 2 Lloyd's Reports 274 held that a clause which provided that the insured was not to be indemnified unless the plaintiff first obtained judgment against him, did not prevent the defendant from bringing the insurers into the action by way of third party proceedings. The court reasoned that if the insurer was not present at the trial of the main action they would not be bound by the result of the proceedings between the plaintiff and the insured and the whole case would have to be reheard when the insured claimed against the insurers. Since this would be unsatisfactory, the court refused to stay the third party proceedings.

In the United States the argument that a no-action clause precludes third party proceedings has been consistently rejected.

"The fact that the policy stipulates that no action will lie against the insurer until judgment has been rendered against the insured and has been paid by him is no bar to impleader: ... third party practice may accelerate the accrual of a right and its objective would be defeated if a "no-action" clause where held to make Rule 14 inapplicable." Moore, Federal Practice S 14.12.

To the same effect is Wright and Miller, Federal Practice and Procedure S 1449:

These clauses are inconsistent with the policy in favor of accelerating the determination of liability that underlies Rule 14.³⁸ Thus, since the leading case of Jordan v. Stephens,³⁹ federal courts, and state courts with similar rules, have given effect to the impleader device at the expense of these insurance policy provisions.⁴ In the Jordan case the court said:

The "no action" clause is directly opposed to Rule 14. It poses a question as to whether the court should permit litigants to circumvent rules of court by contractual arrangements. Rule 14 was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. The object of the rule was to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. The no-action provision of the policy is neither helpful to the third-party defendant, to the courts, nor generally is it in the interest of the public welfare. Its object is to put weights on the already too slow feet of justice.

...

A different result is not required when the argument for honoring the policy provision is premised on the contention that the "no action" clause creates a substantive right in favor of the company immunizing it from impleader. Courts have rejected this analysis and noted that the "no action" clause merely means that there may be no recovery against the insurer except on the basis of a final judgment against the insured. Rule 14 only accelerates the determination of the insurer's liability; it does not result in a judgment against the insurer except when based on a prior judgment against the insured.³

4. Recent Ontario Developments

At one time (prior to 1966) Statutory Condition 6(2) of the Standard Automobile Insurance policy was a typical "no-action" clause. By amendment in 1966 (a year after Int. Formed Tubes it may be noted) this clause was reworded and the courts have now held that it does not prohibit an insured from joining his insurer, who is denying liability, as a third party. See Grenier & Sons Ltd. v Fortier [1980] 29 O.R. (2d) 469 (R.E. Holland J.); Hydro Electric Power Comm. v Varcoe [1973] 1 O.R. 383 (Parker J.). So now we have a curious, if not, bizarre situation. Piper v Spence, the case relied on by the Court of Appeal in Int. Formed Tubes was a case interpreting an earlier no-action clause in an automobile insurance policy. Now that clause has been modified by Statute so as to permit third party proceedings against automobile insurers. Yet via Int. Formed Tubes, Piper v Spence which has been reversed by Statute re automobile insurers, rules non-automobile insurance cases "from the grave".

Recently in Great West Steel Ind. Ltd. v Simcoe & Erie Gen. Ins. Co. (1979) 27 O.R. (2d) 379 a defendant, whose insurer denied coverage and refused to defend, sought to join the insurer as a third party, and the third party proceedings were struck out on the authority of the Int. Formed Tubes case. The defendant then commenced a separate action for a declaration that the policy was in effect and that the insurer was bound to defend. Predictably the insurer moved to stay the action on the basis of the no-action clause and the decision in Int. Formed Tubes. The Court of Appeal, however, held that the action should not be stayed: the Int. Formed Tubes case was to be distinguished. Here the insured was not seeking to enforce the insurer's contractual duty to indemnify but to enforce a different contractual duty (the duty to defend) which was not expressly covered by the "no-action" clause. (Though it should be noted that the clause did say "no action shall be bought" and was not expressly limited to a suit for indemnity.) The insured, the court held, is not forced to wait the final determination of the action against it before becoming entitled to enforce the insurer's obligation to defend such an action. However, the court went on to add that the action for declaratory relief must be limited to the issue of the insurer's duty to defend, and not to its duty to indemnify. A request for declaratory relief with regard to the duty to indemnify would be barred by the no-action clause and the clause could not be circumvented by resort to an action for declaratory relief (citing Piper v Spence).

The results flowing from Great West Steel are disturbing. It directly gives rise to a multiplicity of actions: (a) the declaratory relief action by the insured re the insurer's duty to defend; (b) the main action as to the insured's liability; and

(c) presumably, a subsequent action by the insured, if found liable, to claim indemnity from the insurer. Such a multiplicity of actions is one of the very things third party procedure was designed to overcome.

Moreover, insurance companies may well be disenchanted with the fact that Great West Steel permitted the declaratory relief action with respect to their liability to defend, and may now proceed to redraft their no-action clauses to specifically preclude actions to enforce the duty to defend. (Apparently the office of the Superintendent of Insurance does not scrutinize or regulate the terms of non-automobile policies).

5. Arguments For and Against the Int. Formed Tube Approach

Arguments Favouring Third Party Proceedings. No-action clauses, generally unilaterally imposed by insurance companies without scrutiny by the Superintendent of Insurance, should not preclude third party proceedings. As pointed out by Middleton J. and by the English and U.S. courts the contrary conclusion defeats the very policy and purpose behind the third party procedure.

In this context it is worth restating those policies and the purpose of the procedure.

In *Barclays Bank v. Tom*, [1923] 1 K.B. 221, at p.224, Scrutton L.J., discussed the objects of third party procedure as follows:

"The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions."

In I Williston & Rolls, 426-427, the objects of third party procedure are said to be:

- "(1) To avoid a multiplicity of actions. The procedure provides a substitute for another action, and disposes of all issues arising out of a transaction as between the plaintiff and the defendant, and between the defendant and a third party;
- (2) To avoid the possibility that there might otherwise be contradictory or inconsistent findings in two different actions on the same facts;
- (3) To allow the third party to defend the plaintiff's claim against the defendant;
- (4) To save costs; and
- (5) To enable the defendant to have the issue against the third party decided as soon as possible, in order that the plaintiff cannot enforce a judgment against him before the third party issue is determined."

"No-action" clauses when held to preclude third party proceedings violate these policies in several important respects. First, as the Great West Steel case clearly demonstrates it encourages and actually necessitates a multiplicity of actions. Second, at least in some instances (depending on the terms of the contract to indemnify) it may expose the court and the parties to the risk of inconsistent determinations, since if the insurer is not made a third party to the main action he may not be bound by the decisions arrived at in that action. Third, (and this is perhaps the most disturbing consequence) the insured is deprived of the "accelerating" effect of third party procedure - he is left in the position of having to wait a considerable time before he can establish his right of indemnity against the insurer while the plaintiff may be enforcing his judgment against the insured. The insured must battle alone for 1-3 years the plaintiff's action against him, and then after suffering judgment, proceed to wage a 1-3 year battle against the insurer to establish the liability to the insurer to indemnify him. This is a very harsh consequence and one which third party proceedings are designed to avoid.

These arguments suggest the conclusion that "no-action" clauses should not preclude third party proceedings. Put another way, insurance companies should not be permitted to use their power to impose "contracts of adhesion" to thwart the social benefits of third party procedure.

Arguments favouring preclusion of third party proceedings through "no-action" clauses. What arguments can be made in favour of the Int. Formed Tubes position?

One argument that might be raised is that without such protection insurance companies may be third parties where the main action is to be tried by a jury. This is no argument for retaining the effect of no-action clauses because in Ontario, even in the absence of a no-action clause, courts will disallow third party proceedings where the main action is to be tried to a jury.

Of more substance is the argument that to allow third party proceedings may draw the insurer - who may ultimately be found not liable - into an action which may be long, protracted and costly to defend. (Brice & Great West Steel were probably both instances of such cases.) If the insurer undertakes the defence of the main action but is successful in its no coverage argument, it may never recover its cost of defence from the insured. While this concern of the insurer is understandable there are at least two answers. By becoming a third party the insurer is not obligated to itself defend the main action, or to conduct the defence of the insured. If it is sure of its position that there

.../9

is no coverage, it can defend the third party claim and leave the insured to defend the main action - but on the reasonable condition that it will be bound by the decision arrived at in the main action. In some cases it may even be possible to try the question of coverage, or more particularly the duty to defend, as a preliminary issue before the trial of the main action, and where this can be conveniently be done it will benefit both the insured and the insurer.

Conclusion On balance, given the existence of third party practice and the policies underlying it there seems no good reason for permitting insurance companies to use their unilateral contracting power to opt out of the procedure which is generally applicable to all litigants. Insurance companies are justified in insisting that they not be called on to pay until after judgment against the insured - but their being made third parties does no violence to this principle. It will never lead to the insurer being called on to pay until (a) the defendant is found liable and (b) the insurer is found liable on the policy. Third party practice gives the insurer all the protection he needs.

6. Solutions

If the conclusion arrived at above is sound the easiest solution would be to have the Court of Appeal overrule its decision in Int. Formed Tubes. Unfortunately this is not within our control. It is not a solution but rather the problem.

The alternatives would appear to be to reverse the Int. Formed Tubes in the new rules, or to request an amendment to the Insurance Act to prohibit the use of, or to nullify the effect of, no-action clauses. Either solution would work but the Rule's approach may be preferable.

Rules Approach. This solution would be to add an additional sub-rule to rule 30.01. The present 30.01 would be renumbered

30.01 (1) and a new sub-rule along the lines of either of the following added.

30.01(2) A defendant is not disentitled to make a third party claim by reason only of the fact that a contract between the defendant and the third party provides that no action may be brought against the third party until after a judgment against the defendant.

OR

30.01(2) A third party claim, if otherwise proper, may be made notwithstanding that a contract between the defendant and the third party provides that no action may be brought until after judgment against the defendant.

To remove any difficulty as to the power of the Rules Committee to enact such a rule, the proposed Judicature Act s.40(2) (e) should probably be amended to read:

(e) providing for pleadings and for the availability and the assertion of claims by way of counterclaim, cross-claim or third party claim.

.../11

Insurance Act Approach. This solution would be to amend the Insurance Act to proscribe or to limit the effect of no-action clauses. To prohibit no-action clauses would be over-kill because an insurer should have the right to provide that he shall not be liable to pay until the insured's liability is established by judgment and the insurer's liability is similarly established. An amendment to the Insurance Act - along the lines of the rule proposed above - would be less satisfactory than the Rules approach on two grounds. First, what is essentially a matter of procedure would be found in an unrelated Act. Second, it would reach only insurance contracts, whereas the proposed rule change would reach all contracts of indemnity.

We propose the rule approach set forth above with the consequential amendment to proposed s.40(2)(e) of the Judicature Act. We also recommend that before the final adoption of such provisions there be further discussions with the office of the Superintendent of Insurance and that the insurance industry be given notice of the provisions being considered and an opportunity to make written representations.

TIME FOR DELIVERY OF THIRD PARTY CLAIM

30.02 (1) A third party claim (Form 30A) may be issued without leave within thirty days after the time limited for delivery of the statement of defence in the main action, or subsequently with leave, and leave shall be granted unless the plaintiff would be prejudiced thereby.

(2) A third party claim shall be served, together with a copy of the statement of claim and the statement of defence in the main action, on the third party, in the manner prescribed for the service of an originating process, within thirty days after it is issued.

(3) A third party claim shall also be served on the plaintiff in the main action within the time for service on the third party, but personal service is not required.

30.02

- L.R. and form reference added.
- Working Group. Williston rule said that a third party claim may be issued without leave within 10 days etc. We propose it be 30 days. Although the leave provision has now been liberalized, 10 days would necessitate too many applications for leave. But is a 30 day provision, as of right, unfair to plaintiffs?

30.02 Time for Delivery of Third Party Claim

(1) A Third Party Claim may be issued without leave within 10 days after the time limited for delivery of the Statement of Defence in the main action, or subsequently with leave, and such leave shall be granted unless the plaintiff would be prejudiced thereby.

(2) A Third Party Claim shall be served, together with a copy of the Statement of Claim and the Statement of Defence in the main action, on the third party, in the manner prescribed for the service of originating process, within 30 days.

(3) A Third Party Claim shall also be served on the plaintiff in the main action within the time limited for the service thereof on the third party, but personal service thereof is not required.

THIRD PARTY DEFENCE

30.03 A third party may dispute his liability to the defendant by delivering a third party defence within twenty days after service of the third party claim.

30.03

- Williston 30.03(1) and 30.04, L.R. and form number added.
- Working Group. The present practice requires a third party to deliver a separate pleading (a statement of defence) if he intends to defend the main action. Williston 30.03 would have the third party include his defence to the main action in the third party defence. There are both practical and conceptual reasons why that procedure is unsatisfactory. In the first place, it will mean that the third party defence forms part of the record of the main action. Secondly, there seems to be no place in the third party defence (which is in fact an answer by the third party to the defendant's claim) for allegations which relate only to the main action. We prefer the present practice. (In any event, Form 27I now contemplates the co-mingling of the two defences, and if Williston 30.03 is to remain as drafted, the form should be changed so as to separate the two defences.)
- We propose that the third party defence include only the third party dispute of the defendant's claim, and revised rule 30.03 provides for this. The third party's defence of the main action (and the consequence of his so doing) are dealt with separately in revised rule 30.05.

30.03 Third Party Defence

(1) In a Third Party Defence, a third party may dispute the liability of the defendant to the plaintiff or his own liability to the defendant, or both.

30.04 Time for Delivery of Third Party Defence

A Third Party Defence shall be delivered within 20 days after service of the Third Party Claim.

REPLY TO THIRD PARTY DEFENCE

30.04 A reply to a third party defence (Form 30C), if any, shall be delivered within ten days after service of the third party defence.

30.04

- Williston 30.07 and 30.08 reduced to one rule, form number added and reference to a reply by the plaintiff deleted (and transferred to 30.05(2)).

30.07 Reply to Third Party Defence

A Reply to a Third Party Defence may be delivered by the defendant making the third party claim and, where a Third Party Defence disputes the liability of the defendant to the plaintiff, by the plaintiff.

30.08 Time for Delivery of Reply to Third Party Defence

A Reply to a Third Party Defence, if any, shall be delivered within 10 days after delivery of the Third Party Defence.

DEFENCE OF MAIN ACTION BY THIRD PARTY30.05

- Working Group. This rule gives effect to our proposal that where the third party wishes to defend the main action he should deliver a Statement of Defence therein rather than include his defence to the main action in his third party defence.

- Subrule (1) The opening phrase "where the third party's liability, etc." has been included because under the new expanded scope of third party procedure (see 30.01) it may now be invoked by a defendant in circumstances where, notwithstanding that he defeats the plaintiff's claim, his own third party claim may succeed. Consequently there will be circumstances in which it will be inappropriate for the third party to defend the main action. Looked at one way, the phrase could be omitted since the rule is merely permissive and it can be left up to third party to decide whether or not he is interested in defending the main action. The contrary argument is that if 30.05(1) is left unqualified the courts may seize upon it (i.e. a general right to defend the defendant's liability to the plaintiff) to restrict the scope of 30.01 to situations where the claim over of the defendant is dependent upon him losing to the plaintiff.

30.05(1) Where the third party's liability to the defendant is contingent on the defendant's being found liable to the plaintiff, the third party may dispute the liability of the defendant to the plaintiff by delivering a statement of defence to the plaintiff's statement of claim, in which he may raise any defence that is open to the defendant.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

WILLISTON'S PROPOSED RULES

(2) The statement of defence of the third party shall be delivered within twenty days after service of the third party claim.

(3) The plaintiff may deliver a reply to the third party's statement of defence within ten days after service of the statement of defence.

(4) Where the third party disputes the liability of the defendant to the plaintiff, the third party and the plaintiff are entitled to discovery from each other.

(5) Where a third party does not dispute the liability of the defendant to the plaintiff, the third party is bound by any judgment or decision in the main action.

- Subrule (2). New

- Subrule (3) Williston 30.07 redrafted.

- Subrule (4) Williston 30.05(c), L.R.

- Subrule (5) Williston 30.03(2). Working Group. The closing words of the Williston subrule "except a judgment obtained on consent or by default" have been deleted. We believe that a third party should be bound by such judgments if they are granted on notice to him. What is need is not a provision that the third party is not bound by such judgments, but rather that such judgments should only be granted on notice to the third party. This is now provided for in revised rule 30.06(b).

30.07 Reply to Third Party Defence

A Reply to a Third Party Defence may be delivered by the defendant making the third party claim and, where a Third Party Defence disputes the liability of the defendant to the plaintiff, by the plaintiff.

30.08 Time for Delivery of Reply to Third Party Defence

A Reply to a Third Party Defence, if any, shall be delivered within 10 days after delivery of the Third Party Defence.

30.05 (c) where the Third Party Defence disputes the liability of the defendant to the plaintiff, the third party and the plaintiff are entitled to discovery, each from the other; and

30.03 (2) Where a Third Party Defence does not dispute the liability of the defendant to the plaintiff, the third party shall be deemed to admit the validity of any judgment against the defendant obtained by the plaintiff, except a judgment obtained on consent or by default.

EFFECT OF THIRD PARTY DEFENCE

30.06 Where a third party has delivered a third party defence,

- (a) he shall be served with all subsequent documents in the main action;
- (b) judgment in the main action on consent or after the noting of default of the defendant may be obtained only on notice to the third party;
- (c) the parties to the third party claim have the same rights to discovery as if they were the parties to an action; and
- (d) where the defendant making the third party claim has also made a cross-claim against a co-defendant, the co-defendant and the third party have the same rights to discovery as if they were the parties to an action.

EFFECT OF DEFAULT OF THIRD PARTY

30.07 Where a third party has been noted in default the defendant may [^]obtain judgment against him only at the trial of the main action or on motion to a judge.

30.06

- Basically Williston 30.05 with some changes.
- Clause (b). This is the provision discussed above providing for notice to a third party if there is to be a consent or default judgment in the main action.
- Clause (c). Williston 30.05(b), L.R.
- Clause (d). Williston 30.05(d), L.R.

30.07

- Williston 30.06, L.R.

30.05 Effect of Third Party Defence

Where a third party has delivered a Third Party Defence,

- (a) he shall be served with all subsequent pleadings and proceedings in the main action;
- (b) the parties to any third party claims who are adverse in interest are entitled to discovery, each from the other;
- (d) where the defendant making the third party claim has also made a cross-claim against his co-defendant, that co-defendant and the third party, if adverse in interest, are entitled to discovery, each from the other.

30.06 Effect of Default of Third Party

Where a third party has been noted in default, the defendant may only obtain judgment against him at the trial of the main action or upon motion to a judge.

TRIAL OF THIRD PARTY CLAIM

30.08 (1) After the close of pleadings in the third party claim it shall be set down for trial as an action as provided in Rule 47 without undue delay and, notwithstanding Rule 47.07 (position of actions on trial list), it shall be placed on the list for trial next following the main action.

(2) The third party claim shall be tried at or immediately after the trial of the main action, unless otherwise ordered.

(3) A third party who has disputed the liability of the defendant to the plaintiff by delivering a statement of defence may appear at the trial of the main action and take part as if he were a defendant, and the third party is bound by any judgment or decision in the main action.

APPEAL FROM JUDGMENT OR ORDER
IN THE MAIN ACTION

30.09 A third party who has disputed the liability of the defendant to the plaintiff by delivering a statement of defence has the same right to appeal from a judgment in the main action as if he were a defendant and is entitled to notice of an appeal.
A

PREJUDICE OR DELAY TO PLAINTIFF

30.10 The plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and he may bring a motion to impose such terms as are necessary to prevent prejudice or delay where that may be done without injustice to the defendant or the third party.
A

30.08

- Williston 30.09, L.R.

- Subrule (3). The third party is given same rights at the trial as a defendant, and not to be subject to a general judicial discretion.

30.09

- Williston 30.10, L.R.

30.10

- Williston 30.11, L.R.

30.09 Trial of Third Party Claim

(1) After the close of pleadings in the third party claim, it shall be set down for trial as an action as provided in Rule 47 without undue delay and, notwithstanding Rule 47.07, it shall be placed on the list for trial next following the main action.

(2) The Third Party Claim shall be tried at, or immediately after the trial of the main action, unless otherwise ordered.

(3) A third party who has delivered a Third Party Defence disputing the liability of the defendant to the plaintiff, shall be at liberty to appear at the trial of the main action and take part therein in such manner and to such extent as the trial judge may direct, and the third party shall be bound by any judgment or decision in the main action.

30.10 Appeal from Judgment or Order in the Main Action

A third party who has delivered a Third Party Defence disputing the liability of the defendant to the plaintiff shall have the same right to appeal from any judgment or order in the main action as if he were a defendant, and shall be entitled to notice of any appeal therefrom.

30.11 Prejudice or Delay to Plaintiff

The plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and he may apply to the court to impose such terms as may be necessary to prevent such prejudice or delay where that may be done without injustice to the defendant or the third party.

THIRD PARTY DIRECTIONS

30.11 Any party affected by a third party claim may bring a motion for directions in respect of any matter of procedure not otherwise provided for in these rules.

CLAIMS BY THIRD AND SUBSEQUENT PARTIES

30.12 (1) A third party may, by commencing a fourth party claim, assert against any person, whether or not he is already a party to the main action or to the third party claim, any claim that is properly the subject-matter of a third party claim under Rule 30 and Rule 30 applies, with necessary modifications, to the fourth party claim.

(2) Personal service of a fourth party claim is not required on a fourth party who is a party to the main action or to the third party claim unless he has failed to deliver a notice of intent to defend or a statement of defence in the main action or a third party defence to the third party claim, as the case may be, in which case personal service is required, whether or not he has been noted in default in the main action or in the third party claim.

(3) A fourth or subsequent party may assert any claim that is properly the subject-matter of a third party claim in like manner as a third party claim under Rule 30 which applies, with necessary modifications.

30.11

- Williston 30.12, L.R.

30.12

- Williston 30.13, L.R.

- Working Group. Legislative Counsel has used the phrase "Rule 30" rather than "this Rule" on the ground that the latter may be ambiguous. Would it be better to define "this Rule" in Rule 1 and go back to using that phrase.

30.12 Third Party Directions

Any party affected by a third party claim may apply to the court for directions where necessary in respect of any matter of procedure not otherwise provided for in these rules.

30.13 Claims by Third and Subsequent Parties

(1) A third party may assert against any person, whether or not he is already a party to the main action or to the third party claim, any claim which is properly the subject matter of a third party claim under this rule, by commencing a fourth party claim and the provisions of this rule shall apply to any such claim with any necessary modification.

(2) Personal service of a Fourth Party Claim is not required on a fourth party who is a party to the main action or to the Third Party Claim unless he has failed to deliver a Notice of Intent to Defend or a Statement of Defence in the main action or a Third Party Defence to the Third Party Claim, as the case may be, in which case personal service is required, whether or not he has been noted in default in the main action or in the Third Party Claim, as the case may be.

(3) A fourth party, or any subsequent party, may assert any such claim in a like manner and the provisions of this rule shall apply thereto with any necessary modification.

APPLICATION TO COUNTERCLAIM AND CROSS-CLAIM

30.13 Rule 30 applies, with necessary modifications, to the assertion of a third party claim by a defendant to a counterclaim or by a defendant to a cross-claim.

30.13

- Williston 30.14, L.R.

30.14 Application to Counterclaim and Cross-Claim

The provisions of this rule shall apply, with any necessary modification, to the assertion of a third party claim by a defendant to a counterclaim, or by a defendant to a cross-claim.

DISCOVERY

RULE 31 DISCOVERY OF DOCUMENTS

DEFINITIONS

31.01 In rule 31,

- (a) "affiliated corporation" means one of two corporations,
- (i) one of which is the subsidiary of the other,
 - (ii) both of which are subsidiaries of the same corporation, or
 - (iii) each of which is controlled by the same person or persons;
- (b) "document" includes any recording of sound, film, photograph, chart, graph, map, plan, survey, or book of account and any information recorded or stored by means of any device;
- (c) "subsidiary corporation" means a corporation that is controlled directly or indirectly by one or more corporations.

RULE 31 DISCOVERY OF DOCUMENTS30.01

- L.R.

DISCOVERY

RULE 31 DISCOVERY OF DOCUMENTS

31.01 Definitions
In this rule,

affiliated corporation means one of two bodies corporate where one of them is the subsidiary of the other or both are subsidiaries of the same corporate body or each of them is controlled by the same person or persons.

document includes any recording of sound, film, photograph, chart, graph, map, plan, survey, any book of account and any information recorded or stored by means of any device;

subsidiary corporation means a body corporate that is controlled directly or indirectly by one or more bodies corporate;

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

31.02(1) Every document relating to any matter in issue in an action that is or has been in the possession or control of a party to the action [or of which a party has knowledge] shall be disclosed as provided in Rule 31, whether or not privilege is claimed in respect of that document.

Production for Inspection

(2) Every document relating to any matter in issue in an action in the possession or control of any party to the action, shall be produced for inspection if requested, as provided in Rule 31, unless privilege is claimed in respect of that document.

30.02(1)

- L.R.

- Working Group

"Possession or control" seems a preferable term. "Custody" would appear to add nothing. B.C. has opted for "possession or control".

- John Morrissey

Suggests that the scope of disclosure should be extended to require a party to disclose not only documents in his possession or control but also documents of which he has knowledge. Should this extension be made or should the obligation be made limited to disclosing only documents in a party's possession or control, leaving documents of which a party has mere knowledge to be disclosed on examination for discovery (if asked)?

30.02(2)

- L.R.

31.02 Scope of Documentary Discovery

(1) *Disclosure*

Every document relating to any matter in issue in an action which is or has been in the possession, custody or control of any party to the action shall be disclosed, as provided in this rule, whether or not privilege is claimed in respect of that document.

(2) *Production for Inspection*

Every document relating to any matter in issue in an action in the possession, custody or control of any party to the action, shall be produced for inspection if requested, as provided in this rule, unless privilege is claimed in respect of that document.

Insurance Policy

(3) A party shall disclose and produce for inspection any insurance policy under which an insurer may be liable to satisfy ^A part or all of any judgment in the action or to indemnify or reimburse a party for money paid by him in satisfaction of the judgment, but no information concerning the insurance policy is admissible in evidence at the trial unless it is relevant to an issue in the action.

30.02(3)

- L.R.
- Ins. Bur. of Can. objected to the requirement of the disclosure of insurance policies. Working Group considered their comments and found in them no compelling reason to change the Williston proposal. The proposal can be justified in a procedural code as one designed to encourage the resolution of litigation through settlement and to avoid the pursuit of claims where the resulting judgment may be uncollectable. The IBC comments present no arguments to countervail against the advantage of including the provision.

(3) *Insurance Policy*

A party shall disclose and produce for inspection any insurance policy under which any insurer may be liable to satisfy any part or all of any judgment which may be obtained in the action, or to indemnify or reimburse any party for any monies paid by him in satisfaction of the judgment, but no information concerning any such insurance policy shall be admissible in evidence at the trial unless it is relevant to an issue in the action.

Corporate Party

(4) The court may order a corporate party to disclose all relevant documents in the possession ^A or control of a subsidiary or affiliated corporation, and to produce for inspection all such documents that are not privileged.

30.02(4)

- Williston 31.11(2). Working Group. Since this provision allows discovery through a party it seems better to locate it here than in Rule 31.11.

(2) The court may order a corporate party to disclose all relevant documents in the possession, custody or control of a subsidiary or affiliated corporation, and to produce for inspection all such documents which are not privileged.

AFFIDAVITS OF DOCUMENTS

31.03(1) Unless dispensed with on consent [in writing], a party to an action shall, within [ten] days after the close of pleadings, make and serve on every other party an affidavit of documents (Form 31A or 31B) disclosing to the full extent of his knowledge, information and belief all documents that are or have been in his possession or control [or of which he has knowledge] relating to any matter in issue in the action.

31.03(1)

L.R.

Working Group.

Should the consent have to be in writing?

Derry Miller suggests that "within 10 days after the close of pleadings" is unrealistic. Should it be extended?

Working Group: "make and serve"?
Would it be better to say "an affidavit of documents made by the party"?
(Williston 31.03(2) was deleted because affidavits by corporations are dealt with in Rule 4.07(5)).

"To the full extent, etc." added because otherwise Rule 4.07(2) (contents of affidavits) would have limited the application to personal knowledge which is quite inappropriate here.

Forms. Working group proposes two forms -- by an individual and by a corporate officer -- as suggested by D. Miller. The present rules provide two forms. The working group proposes substantial redrafting of Form 31A.

31.03 Affidavit of Documents

(1) Unless dispensed with on consent, a party to an action shall, within 10 days after the close of pleadings, deliver to every other party an Affidavit of Documents (Form 31A) disclosing all documents which are or have been in his possession, custody or control relating to any matter in issue in the action.

(2) The affidavit shall be made by the party or, in the case of a corporation, by an officer, director or employee thereof.

(2) The affidavit shall contain, in separate schedules, lists and descriptions of all documents relating to any matter in issue in the action,

- (a) that are in the possession or control of the party and that he does not object to producing;
- (b) that are in the possession or control of the party and for which he claims privilege and the grounds for the claim;
- (c) that the party formerly had in his possession or control, but that are no longer in his possession or control, together with a statement of when and how he lost possession or control of them and their present location, so far as he can say; and
- [(d) that the party has never had in his possession or control, but of which he has knowledge, together with a statement as to their present location so far as he can say from his information and belief.]

(3) The affidavit shall also contain a statement by the deponent that the party has never had in his possession or control any document relating to any matter in issue in the action other than those listed in the affidavit.

31.03(2)

Williston 31.03(3) redrafted to provide for schedules to the affidavit and the language is generally substantially redrafted.

31.03(3)

- Williston 31.03(1)(d), L.R.

(3) The affidavit shall contain,

- (a) a list and description of all documents relating to any matter in issue in the action which are in the possession, custody or control of the party and for which he claims no privilege;
- (b) a list and description of all documents relating to any matter in issue in the action which are in the possession, custody or control of the party and for which he claims privilege and the grounds for any such claim;
- (c) a list and description of all documents relating to any matter in issue in the action which the party has had in his possession, custody or control, which he cannot now produce because they are no longer in his possession, custody or control, and he shall account for when and how he lost possession, custody or control of them and their present whereabouts, so far as he can say, either from his own knowledge or from his information or belief;
- (d) a statement by the deponent that the party has not, and has never had, any other documents relating to any matter in issue in the action in his possession, custody or control so far as the deponent knows or believes.

(4) The affidavit shall be endorsed by the solicitor for the party delivering the affidavit with a certificate that

(a) he has explained to the deponent the necessity of making a full and fair disclosure of all relevant documents; and

(b) that he has no knowledge of any document not disclosed in the affidavit.

INSPECTION OF DOCUMENTS

31.04(1) A party is entitled to inspect any document that is not privileged and that is referred to in the affidavit of documents of any other party as being in his possession or control, by serving on him a request to inspect documents (Form 31C).

(2) A request to inspect documents may also be used to obtain the inspection of any document in the possession or control of any other party that is referred to in the originating process, pleadings or any affidavit filed by him.

31.03(4)

- Williston 31.03(4), L.R.

31.04(1)

- Williston 31.04(2), L.R.

31.04(2)

Williston 31.04(1), L.R.

Derry Miller asked why did Williston introduce the phrase "in his possession, etc." into the sub-rule (there is no such qualification in present R.350). Working Group: how can a party produce a document unless it is "in his possession, etc."?

(4) The affidavit shall be endorsed by the solicitor for the party delivering the affidavit with a certificate that he has explained to the deponent the necessity of making a full and fair disclosure of all relevant documents and that he has no knowledge of any document not disclosed in the affidavit which should have been disclosed.

31.04(2) A Request to Inspect Documents may also be used to obtain the inspection of any document listed in the Affidavit of Documents of any party as being in his possession, custody or control and which is not privileged.

31.04 Inspection of Documents

(1) A party is entitled, at any time, to inspect any document referred to in the originating process, the pleadings, or any affidavit filed by any other party, which are in his possession, custody or control, by serving on such party a Request to Inspect Documents (Form 31B).

(3) A party upon whom a request to inspect documents is served shall forthwith inform the party making the request of a time between 9:30 a.m. and 4:30 p.m. and a date within five days after the service of the request to inspect documents on which the documents may be inspected at the office of his solicitor, or some other convenient place, and shall at the time and place ~~so~~ named make the documents available for inspection.

(4) The court may at any time order production for inspection of documents that are not privileged and that are in the possession or control of a party.

(5) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

(6) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at his own expense, unless the person having possession ^{or} control of the document agrees to make a copy, in which case he shall be reimbursed for the cost of making the copy.

(7) Where a document may become relevant ^{only} after the determination of an issue in the action and the production of the document for inspection before the issue is determined would seriously prejudice a party, the party may bring a motion for leave to withhold production ^{until} after the issue has been determined.

31.04(3)

- L.R. Williston required a notice to be served, Derry Millar suggested there should be a form. Working Group. Better to just say "shall inform" and then it can be oral or by letter. Surely there is no need for a notice or a form.

31.04(4)

- Part of Williston 31.04(4), L.R.

31.04(5)

- Part of Williston 31.04(4), L.R.

31.04(6)

- Williston 31.04(5), L.R.

31.04(7)

- Williston 31.04(6), L.R.

(3) A party upon whom a Request to Inspect Documents is served shall forthwith serve on the party making such request, a notice stating a time between 9:30 a.m. and 4:30 p.m. and a date within 5 days from the service of the Request to Inspect Documents on which the documents may be inspected at the office of his solicitor, or some other convenient place, and shall at the time and place so named make the documents available for inspection.

(4) The court may at any time order production for inspection of documents generally or of any particular document in the possession, custody or control of any party for which no privilege is claimed. Where privilege is claimed for any document, the court may inspect the document to determine the validity of such claim.

(5) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy thereof at his own expense unless the person having possession, custody or control of the document agrees to make a copy for the party inspecting the document, if it can be reproduced, in which case he shall be reimbursed for the cost of so doing.

(6) Where a document may only become relevant after the determination of one or more of the issues in the action and the production of any such document for inspection prior to that determination would result in a serious prejudice to any party, he may apply to the court for leave to withhold the production thereof until after any such issue has been determined.

EFFECT OF DISCLOSURE OR PRODUCTION FOR INSPECTION

31.05(1) The disclosure or the production of a document for inspection shall not be taken as an admission of the relevance or admissibility of the document.

(2) Any document listed in an affidavit of documents or produced for inspection by a party shall, without notice, summons or order, be taken by him to his examination for discovery and to the trial of the action, unless the parties agree otherwise.

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

31.06 Where it appears that a document in the possession, or control of a party may have been omitted from his affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

- (a) order cross-examination on the affidavit of documents;
- (b) order delivery of another [, complete] affidavit of documents;
- (c) order the disclosure or production for inspection of the document or part of the document if it is not privileged; and
- (d) inspect the document for the purpose of determining the validity of a claim of privilege.

31.05(2)

- L.R.

31.06

- L.R.

31.05 Effect of Disclosure or Production for Inspection

(1) The disclosure or the production of a document for inspection shall not be taken as an admission of the relevance or admissibility of the document.

(2) Any document listed in his Affidavit of Documents or produced for inspection by a party shall, without notice, summons or order, be taken by him to his examination for discovery and to the trial of the action, unless the parties otherwise agree.

31.06 Where Affidavit Incomplete or Privilege Improperly Claimed

Where it is made to appear that any document in the possession, custody or control of a party may have been omitted from his Affidavit of Documents, or that a claim of privilege may have been improperly made therein, the court may,

- (a) order cross-examination upon the Affidavit of Documents;
- (b) order delivery of a further and better Affidavit of Documents;
- (c) order the disclosure or production for inspection of any document, or any part of a document, which is not privileged; and
- (d) inspect any document for the purpose of determining validity of any claim of privilege.

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

31.07 Where a document relating to a matter in issue in the action comes into the possession ^{or} control of a party after he has served his affidavit of documents, or where he subsequently discovers that the affidavit is inaccurate or incomplete, he shall deliver forthwith a supplementary affidavit specifying the extent to which his affidavit of documents requires qualification and disclosing any additional documents.

31.07

- L.R.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

31.08(1) Where a party fails to disclose a document in his affidavit of documents or fails to produce a document for inspection in compliance with Rule 31 or an order made under Rule 31, he may not use the document at the trial, except by leave of the trial judge.

31.08

- L.R.

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with Rule 31, or fails to comply with an order made under Rule 31, the court may,

- (a) revoke or suspend his right, if any, to initiate or continue an examination for discovery;
- (b) dismiss his action, if he is a plaintiff, or strike out his statement of defence, if he is a defendant; and
- (c) impose such terms as to costs or otherwise as are just.

31.07 Documents or Errors Subsequently Discovered

Where any document relating to a matter in question in the action comes into the possession, custody or control of any party after delivering his Affidavit of Documents, or he subsequently discovers that the affidavit is inaccurate or incomplete, he shall deliver forthwith a supplementary affidavit specifying the extent to which his Affidavit of Documents requires qualification and disclosing any additional documents.

31.08 Effect of Failure to Disclose or Produce for Inspection

(1) Where a party fails to disclose any document in his Affidavit of Documents or fails to produce any document for inspection in compliance with this rule or any order made thereunder, he may not use such document at the trial, except by leave of the trial judge.

(2) Where a party fails to deliver an Affidavit of Documents or produce any document for inspection in compliance with this rule, or fails to comply with any order made under this rule, the court may,

- (a) revoke or suspend his right, if any, to initiate or continue any examination for discovery;
- (b) dismiss his action, if he is a plaintiff, or strike out his Statement of Defence, if he is a defendant; and
- (c) impose such terms as to costs or otherwise, as to the court may seem just.

EFFECT OF FAILURE TO ABANDON CLAIM OF PRIVILEGE

31.09 Where a party has claimed privilege in respect of a document and fails to abandon the claim by notice in writing and by delivering a copy of the document or producing it for inspection not less than ten days before trial, he may not use the document at the trial, except to impeach the testimony of a witness or by leave of the trial judge.

31.09

- L.R.

- Hamilton Law Assoc. suggest this rule will require solicitors to review their files earlier than one or two days before trial. Working Group. We are unpersuaded and believe the ten day provision should stay.

Williston 31.10

- Working Group

We propose that this rule be deleted and the subject be covered in a general rule on admissions (which will incorporate this rule and Rule 51, Request for Admissions). The new rule would become a new Rule 37, if the rules are renumbered, or would replace the present Rule 51 if the rules are not renumbered.

31.09 Effect of Failure to Abandon Claim of Privilege

Where a party has, at any time, claimed privilege in respect of any document and fails to abandon that claim by notice in writing and by delivering a copy of such document or producing it for inspection not less than 10 days before trial, he may not use such document at the trial, except to impeach the testimony of a witness or by leave of the trial judge.

31.10 Notice to Admit Authenticity, Dispatch or Receipt of Specified Documents

(1) Any party to an action may, at any time, require any other party thereto to admit the authenticity or dispatch or receipt of any particular document by serving upon him a notice to that effect.

(2) Where practicable, a copy of any such document shall be served with the notice, unless it appears from the Affidavit of Documents, if any, of the party to be served, that a copy thereof is in his possession.

(3) Unless the party upon whom such notice has been served, within 30 days thereafter, serves notice that he does not admit the authenticity or dispatch or receipt thereof, and that he requires it to be proved at the trial, he shall be deemed to admit that any such document described in the Affidavit of Documents,

(a) as an original document, was printed, written, signed or executed as it purports to have been;

(b) as a copy, is a true copy;

(c) as a copy of a letter, telegram, cablegram or telecommunication, the original was dispatched to the addressee or received by him, as the case may be.

(4) Where the authenticity or dispatch or receipt of any document is so admitted by any party, he may not thereafter put in issue the authenticity or dispatch or receipt of that document without leave of the court.

DOCUMENTS IN THE POSSESSION OF A PERSON NOT A PARTY

31.10(1) Where a document that is not privileged is in the possession [^] or control of a person not a party to the action, any party may bring a motion, on notice to the person and to every other party, for an order for the production [^] of the document for inspection. [^]

(2) No order shall be made for the production for inspection of any such document unless the court is satisfied that the document is relevant to a material issue in the action and that it would be unfair to require the party bringing the motion to proceed to trial without having discovery of the document.

(3) Where privilege is claimed for any such document, or where the court is in doubt as to the relevance of or the necessity for the discovery of the document, the court may inspect the document.

(4) The court may give directions respecting the preparation of a certified copy of any such document and the certified copy may be used for all purposes in place of the original.

31.10

- Williston 31.11, L.R.

- Williston sub-rule (2) has been moved up to now become 31.02 (see above).

- Sub-rule (2) is Williston sub-rule (3), L.R.

- Sub-rule (3) is Williston sub-rule (4), L.R.

- Sub-rule (4) is an addition to the Williston rule and picks up the wording in present R.349.

31.11

- Williston 31.12, L.R.

31.11 Documents in the Possession of a Person Not a Party

(1) Where a document is in the possession, custody or control of a person not a party to the action, any party may apply to the court, on notice to such person and to every other party, for an order for the production for inspection of any such document which is not privileged.

(2) The court may order a corporate party to disclose all relevant documents in the possession, custody or control of a subsidiary or affiliated corporation, and to produce for inspection all such documents which are not privileged.

(3) No order shall be made for the production for inspection of any such document unless the court is satisfied that the document is relevant to a material issue in the action and that it would be inequitable to require the applicant to proceed to trial without having discovery of that document.

(4) Where privilege is claimed for any such document, or where the court is in doubt as to the relevance of, or the necessity for the discovery of any such document, the court may inspect the document.

[^] DOCUMENT IMPOUNDED FOR SAFE KEEPING [^]

31.11 [^] The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person other than a party [^] or his solicitor, except by leave of the court.

31.12 Any Document may be Impounded for Safe Keeping

The court may order that any relevant document be deposited for safe keeping with the registrar and thereafter that document shall not be inspected by any person other than a party to the action, or his solicitor, except by leave of the court.

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

Working Group. Numerous rules provide that, as a sanction for failure to make timely disclosure of information, documents or reports, evidence thereof may not be adduced to trial except with leave of the trial judge. See e.g.

31.08(1) documents not disclosed or produced

31.09 failure to abandon privilege

32.07 refusal to answer proper questions on discovery

32.09(1) failure to disclose information subsequently obtained

52.01(2) failure to deliver experts
& 52.03 reports at least 10 days before trial

On several occasions concern has been expressed that these provisions, if applied literally so as to exclude the evidence, could lead to the unfortunate result of cases being decided other than on the merits.

This is not the true intent of these provisions. What is intended is that the party who has failed to make timely pretrial disclosure should not be able to lead the evidence as of right, but only on appropriate terms as to costs and an adjournment (where necessary). We propose that the following rule be added to Rule 55 Evidence at Trial to make this quite clear.

55.06 Where by these rules evidence is admissible only with leave of the trial judge because a party has failed to make prior disclosure, such leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party.

RULE 32 EXAMINATION FOR DISCOVERY

DEFINITIONS

32.01 The definitions of "affiliated corporation", "document" and "subsidiary corporation" in rule 31.01 also apply to Rule 32.

FORM OF EXAMINATION FOR DISCOVERY

32.02(1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject any person to both forms of examination except by leave of the court.

(2) Where a person is liable to be examined by more than one party, the examination for discovery shall take the form of an oral examination, unless otherwise agreed by all of the parties entitled to examine the person.

WHO MAY EXAMINE AND BE EXAMINED

Generally

32.03(1) A party to an action may examine for discovery once, without leave, any other party [^]who is adverse in interest to him.

RULE 32 EXAMINATION FOR DISCOVERY

32.01

- L.R.: definitions are referred to

32.02

- Williston 32.04, L.R. Working Group
This seems a better location for this rule particularly since it introduced a new form of examination for discovery.

32.03(1)

- L.R.

RULE 32 EXAMINATION FOR DISCOVERY

32.01 Definitions

The definitions contained in Rule 31.01 also apply to this rule.

32.04 Form of Examination for Discovery

(1) Subject to paragraph (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject any person to both forms of examination except by leave of the court.

(2) Where a person is liable to be examined by more than one party, the examination for discovery shall take the form of an oral examination, unless otherwise agreed by all of the parties entitled to examine such person.

32.02 Who May Examine and Be Examined

(1) Any party to an action may examine for discovery, once, without leave, any other party thereto who is adverse in interest to him.

On Behalf of Corporation

(2) Where the party to be examined is a corporation, the examining party may examine an officer, director or employee thereof on behalf of the corporation, but the corporation may bring a motion at any time before the examination for an order requiring the examining party to examine another officer, director or employee.

(3) Where an officer, director or employee of a corporation has been examined, no other officer, director or employee may be examined without leave of the court.

On Behalf of Partnership

(4) Where an action is brought by or against a partnership or a sole proprietorship in the firm name, each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be, at any relevant time, may be examined on behalf of the ~~partnership~~ or sole proprietorship.

32.03(2) & (3)

- Williston 32.02(2) divided into two subrules and L.R.

(2) Where the party to be examined is a corporation, the examining party may examine an officer, director or employee thereof on behalf of the corporation; provided, however, that the corporation may apply to the court at any time prior to the examination for an order requiring the examining party to examine some other officer, director or employee thereof. Where an officer, director or employee of a corporation has been so examined, no other officer, director or employee thereof may be so examined without leave of the court.

32.03(4)

- Williston 32.02(3) L.R.

(3) Where an action is brought by or against a partnership or a sole proprietorship in the firm name, any person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be, at any relevant time, may be examined on behalf of the partnership.

Williston 32.03(4)

- Has been temporarily deleted pending a decision as to the retention or dropping of rule 9 Unincorporated Associations.

(4) Where an action is brought by or against an unincorporated association, an officer or employee may be examined on behalf of the association; provided, however, that the association may apply to the court at any time prior to the examination for an order requiring the examining party to examine some other officer or employee thereof. Where an officer or employee of an association has been so examined, no other officer or employee may be so examined without leave of the court.

In Place of Person under Disability

(5) Where an action is brought by or against a party under a disability, the litigation guardian or committee[^] may be examined in place of the person under a disability, or, at the option of the examining party, the person under a disability may be examined if he is competent to give evidence, but a litigation guardian or committee who is the Official Guardian or the Public Trustee may[^] be examined only with leave of the court.

32.03(5)

- L.R.

Assignee

(6) Where an action is brought by or against an assignee, the assignor may be examined in addition to the assignee.

(5) Where an action is brought by or against a party under disability, the litigation guardian or committee, as the case may be, may be examined in place of the person under disability, or, at the option of the examining party, the person under disability if he is competent to give evidence; provided, however, that where the litigation guardian or committee is the Official Guardian or the Public Trustee, he may only be examined with leave of the court.

(6) Where an action is brought by or against an assignee, the assignor may be examined in addition to the assignee.

Trustee in Bankruptcy

(7) Where an action is brought by or against a trustee of the estate of a bankrupt, the bankrupt may be examined in addition to the trustee.

(7) Where an action is brought by or against a trustee of the estate of a bankrupt, the bankrupt may be examined in addition to the trustee.

Nominal Party

(8) Where an action is brought or defended for the immediate benefit of a person who is not a party, he[^] may be examined in addition to the party bringing or defending the action.[^]

(8) Where an action is brought or defended for the immediate benefit of a person who is not a party thereto, that person may be examined in addition to the party bringing or defending the action, as the case may be.

WHEN EXAMINATION MAY BE INITIATED

32.04(1) A party who seeks to examine a plaintiff for discovery may serve a notice of examination under rule 33.05 or written questions under rule 34.01 only after the examining party has delivered his statement of defence and, unless dispensed with by consent, his affidavit of documents.

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 33.05 or within question under Rule 34.01 only after,

(a) the defendant has delivered his statement of defence and, unless dispensed with by consent, the examining party has served his affidavit of documents; or

(b) the defendant has been noted in default.

(3) The party who first serves a notice of examination on another party may complete the examination without being examined himself unless the parties consent or the court orders otherwise.

32.04(1) & (2)

- Williston 32.03(1) ((2) language substantially redrafted.

- Working Group. The Williston rule said "proceedings for examination for discovery... may only be instituted". This phrase, though correct, was vague. We feel it is helpful to indicate here that what is meant is the service of a notice of examination (and to indicate where in the rules that matter is dealt with) or the service of written questions.

32.04(3)

- New. Working Group. Under the present rules an examining party appears to have an absolute right to complete his examination before himself being examined. This can lead to abuse. We recommend that the court be given power to "otherwise order". But if this is the intent of the rule should it be recast?

32.03 When Proceedings for Examination may be Initiated

(1) Proceedings for the examination of a plaintiff for discovery may only be initiated after the examining party has delivered his Statement of Defence and, unless dispensed with on consent, his Affidavit of Documents.

(2) Proceedings for the examination of a defendant for discovery may only be initiated after the defendant has delivered his Statement of Defence and, unless dispensed with on consent, the examining party has delivered his Affidavit of Documents, or after the defendant has been noted in default.

ORAL EXAMINATION BY MORE THAN ONE PARTY

32.05(1) Where a person is liable to be examined for discovery orally by more than one party, there shall be only one examination.

(2) Any adverse party may initiate the examination.

(3) The party examining first may cover the common ground and all matters relevant to the issues between him and the person being examined.

(4) Any other party may then cover any common ground not already covered, and all matters relevant to the issues between him and the person being examined.

32.05

- Williston 32.05 has been divided into subrules and L.R.

32.05 Oral Examination by More than One Party

Where any party is liable to be orally examined for discovery by more than one party, there shall be but one examination. Any adverse party may initiate the examination. The party who examined first may cover the common ground and all matters relevant to the issues between himself and the party being examined. Any other party may then cover any common ground not already covered, and all matters relevant to the issues between himself and the party being examined.

SCOPE OF EXAMINATION

32.06(1) A person who is examined for discovery shall answer, to the best of his knowledge, information and belief, any proper question as to any matter or document relevant to an issue in the action or the name and address of any potential witness.

(2) No question may be objected to on the ground that,

- (a) the information sought is evidence;
- (b) the question is cross-examination unless the question is directed solely to the credibility of the witness; or
- (c) the question is cross-examination on the affidavit of documents of the party being examined.

32.06(1) & (2)

- Williston 32.06(1) subruled and L.R.
- Working Group. (Re identity of potential witnesses.) Under Williston 32.06(1), the basic test was relevance to the issues in the action, and it was then further provided that no objection could be made to questions as to the identity of potential witnesses. This approach may not achieve the desired goal because it could be argued that under the caselaw names of witnesses are only relevant when the person is also an actor, and hence there is no change in the law. The approach taken in the revised rule is that taken in B.C. and New Brunswick for the reasons just stated.

32.06(2) (b)

- Has anything been lost in this redraft of Williston 32.06(1) (c).

32.06 Scope of Examination

(1) Any person being examined for discovery shall answer, to the best of his knowledge, information and belief, any proper question as to any matter or document relevant to any issue in the action and no question may properly be objected to on the ground that,

- (a) the information sought is evidence;
- (b) the information sought is the name and address of a potential witness, except as provided in paragraph (2);
- (c) the question is cross-examination; provided, however, that the question is relevant to an issue in the action and is not directed solely to the credibility of the witness; or
- (d) the question is cross-examination on the affidavit of documents of the party being examined.

(3) A party may obtain discovery of any findings, opinions and conclusions of an expert that have been communicated to the party being examined and that are relevant to an issue in the action, but the party being examined need not disclose such information or the name and address of the expert where,

(a) the only findings, opinions and conclusions of the expert relevant to an issue in the action were made or formed by him in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes that he will not call the expert as a witness at the trial.

(4) A party may obtain discovery of the existence and contents of any insurance policy under which an insurer may be liable to satisfy part or all of any judgment in the action or to indemnify or reimburse a party for money paid by him in satisfaction of the judgment, but no information concerning the insurance policy is admissible in evidence at the trial unless it is relevant to an issue in the action.

(5) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, he may bring a motion for leave to withhold the information until after the issue has been determined.

32.06(3)

- Williston 32.06(2), L.R.

32.06(4)

- Williston 32.06(3), L.R.

32.06(5)

- Williston 32.06(4), L.R.

(2) A party may obtain discovery of any findings, opinions and conclusions of an expert communicated to the party being examined and relevant to an issue in the action; provided, however, that the party being examined need not disclose such information nor the name and address of the expert where,

(a) the only findings, opinions and conclusions of the expert relevant to an issue in the action were made or formed by him in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes that he will not call the expert as a witness at the trial.

(3) A party may obtain discovery of the existence and contents of any insurance policy under which any insurer may be liable to satisfy part or all of any judgment which may be obtained in the action or to indemnify or reimburse any party for any monies paid by him in satisfaction of the judgment, but such information shall not be admissible in evidence at the trial unless it is relevant to an issue in the action.

(4) Where any information may only become relevant after the determination of one or more of the issues in the action and the disclosure of any such information prior to that determination would seriously prejudice any party, he may apply to the court for leave to withhold such information until after any such issue has been determined.

EFFECT OF REFUSAL TO ANSWER

32.07 Where a party or a person examined for discovery on behalf or in place of a party has refused to answer a proper question, or has refused to answer a question on the grounds of privilege, the party may not introduce at the trial the information [^]refused on discovery, except by leave of the trial judge.

EFFECT OF COUNSEL ANSWERING

32.08 Questions on an examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by counsel and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of his examination, he expressly repudiates, contradicts or qualifies the answer.

32.07

- L.R. particularly to specifically deal with the situation where it is not the party himself who is being examined.

32.08

- L.R. to refer throughout to "persons" not just "parties".

32.07 Effect of Refusal to Answer

Where any party being examined for discovery has refused to answer any proper question, or has refused to answer any question on the grounds of privilege, he may not introduce at the trial the information so refused on discovery, except by leave of the trial judge.

32.08 Effect of Counsel Answering

Any question on an examination for discovery shall be answered by the party being examined but, where there is no objection, the question may be answered by counsel. Any such answer shall be deemed to be the answer of the person being examined unless, before the conclusion of his examination, he expressly repudiates, contradicts or qualifies that answer.

INFORMATION SUBSEQUENTLY OBTAINED

32.09(1) Where a party subsequently obtains information by means of which he knows that the answer to any question on his examination for discovery was incorrect or incomplete when made, or that the answer, which was correct and complete when made, is no longer correct or complete, he shall forthwith furnish the information in writing to every other party.

(2) Where a party furnishes information in writing under subrule (1), any adverse party may demand that the information be verified by affidavit of the party.

(3) Where a party has failed to comply with subrule (1) or (2), he may not introduce at the trial the information subsequently obtained, except by leave of the trial judge.

32.09

- Rule has been further subruled. L.R.
- Working Group. Williston rule provided that the subsequent information must be communicated in the form of an affidavit. The revised rule proposes that it may be communicated in writing with the right of the examining party to call for verification by affidavit. What is the better approach? Requiring an affidavit (a) makes updating etc. more cumbersome and expensive, and (b) this might deter a party from doing it.

32.09 Information Subsequently Obtained

(1) Where a party subsequently obtains information by means of which he knows that his answer to any question on his examination for discovery was incorrect or incomplete when made, or that his answer, which was correct and complete when made, is no longer correct or complete, he shall forthwith furnish such information in the form of an affidavit to the examining party and to every other party.

(2) Where any party has failed to comply with the provisions of paragraph (1), he may not introduce at the trial the information subsequently obtained, except by leave of the trial judge.

FURTHER DISCOVERY WITH LEAVE

32.10(1) The court may grant leave, on such terms as are just, to examine for discovery any person who has, or is likely to have, information relevant to a material issue in the action, where the person,

- (a) was, at any relevant time, an employee, agent, partner or spouse of a party;
- (b) was, at any relevant time, an officer, director or auditor of a corporate party;
- (c) is, or was, at any relevant time, an officer, director or employee of a corporation that was, at the time, a subsidiary or affiliate corporation of a corporate party; or
- (d) is a potential witness, other than an expert retained in preparation for contemplated or pending litigation by a party [adverse in interest to the party bringing the motion].

32.10

- L.R.

- Working Group. Given that this extension of examination for discovery to include non-party witnesses (albeit only with leave of court) is a major change with a potential to increase costs etc., the subcommittee may wish to consider the merits of this change.

- The Williston rule puts a blanket prohibition on discovery of retained experts. The U.S. and B.C. rules permit it where the examining party cannot himself obtain the expert evidence elsewhere. New Brunswick has specifically allowed discovery of opposing experts on the theory that, of all the witnesses, this is the person an adversary would most like to discover because of (a) their crucial role in modern litigation, and because of (b) the need to prepare for cross-examination of them. The working group is opposed to the New Brunswick approach.
- In 32.10(1)(d) is the "adversity" qualification necessary or wise?

32.10 Further Discovery with Leave

(1) The court may grant leave, upon such terms as may seem just, to examine for discovery any person who has, or is likely to have, some information relevant to a material issue in the action, where such person,

- (a) was, at any relevant time, an employee, agent, partner or spouse of a party;
- (b) was, at any relevant time, an officer, director or auditor of a corporate party;
- (c) is, or was, at any relevant time, an officer, director or employee of a corporation that was, at such time, a subsidiary or affiliate of a corporate party; or
- (d) is a potential witness, other than an expert retained by a party adverse in interest to the applicant in preparation for contemplated or pending litigation.

(2) An order under subrule (1) shall not be made unless the court is satisfied that the party bringing the motion has been unable to obtain the information from those he is entitled to examine for discovery, or from the person sought to be examined, and that it would be unfair to require the party bringing the motion to proceed to trial without having the opportunity of examining the person.

(3) A party who examines a person under this rule shall serve every party who attended or was represented on the examination with a copy of the transcript [^] free of charge and, unless otherwise expressly ordered, the examining party is not entitled to recover from any other party his costs of the examination.

(4) For the purpose of subrule 32.11(2), the examination of any person under this rule shall not be treated as the examination of a party or of a person on behalf [^] or in place of a party.

(2) An order under paragraph (1) shall not be made unless the court is satisfied that the applicant has been unable to obtain such information from those he is entitled to examine for discovery, or from the person sought to be examined, and that it would be inequitable to require the applicant to proceed to trial without having the opportunity of examining that person.

(3) A party who examines any person pursuant to an order under this sub-rule shall serve every party who attended, or was represented, on the examination with a copy of the transcript thereof free of charge and, unless otherwise expressly ordered, the examining party shall not be entitled to recover from any other party his costs of such examination.

(4) For the purpose of paragraph (2) of Rule 32.11, the examination of any person under this sub-rule shall not be treated as the examination of a party or on behalf of or in place of a party.

USE OF EXAMINATION FOR DISCOVERY AT TRIAL

Admissions

32.11(1) At the trial of an action, a party may read into evidence any part of the examination for discovery of an adverse party that constitutes an admission.

Admissions Attributed to Party

(2) Where a person has been examined for discovery on behalf or in place of a party, an adverse party may read into evidence any part of the examination that constitutes an admission, unless the trial judge orders otherwise, and the admission shall be treated as an admission of the party.

32.11(1)

- L.R.

- "If otherwise admissible" has been deleted as no longer necessary. Williston rule said any part of an examination could be read in as an admission and the qualification ("if otherwise admissible") was necessary because some statements on a discovery may not have the quality of an admission (e.g. information in which a party does not express belief). The revised rule allows only those parts which "constitute an admission" to be read in. Hence the qualifying phrase is no longer necessary. Of course, there will be a test of relevancy but this does not have to be stated.

32.11(2)

- L.R.

32.11 Use of Examination for Discovery at Trial

(1) At the trial of an action, any party may use in evidence, if otherwise admissible, all or any part of the examination for discovery of an adverse party as an admission made by that party.

(2) The evidence of any person examined for discovery on behalf of, or in place of, a party may be used, if otherwise admissible, against that party unless otherwise ordered by the trial judge.

Impeachment

(3) An examination for discovery may be used at the trial for the purpose of impeaching the testimony of the deponent as a witness in the same manner as a previous inconsistent statement made by a witness may be used.

Qualifying Answers

(4) Where only part of an examination is introduced into evidence, any adverse party may request the introduction of any other part of the examination that qualifies or explains the part introduced.

Rebuttal

(5) Where a party introduces into evidence all or [^] part of the examination of an adverse party, he may rebut that evidence by introducing any other admissible evidence.

Party under Disability

(6) The evidence of a party under disability taken on an examination for discovery may [^] be used at the trial only be leave of the trial judge.

Unavailability of Deponent

(7) Where the deponent has died or is unable to [^] testify because of age, infirmity or illness, or where for any other sufficient reason his attendance cannot be obtained or compelled, the trial judge may allow the examination to be used for any purpose by any party.

32.11(3)

- L.R.

32.11(4)

- L.R.

32.11(5)

- L.R.

32.11(6)

- L.R.

32.11(7)

- L.R.

(3) Any examination for discovery may be used at the trial for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement made by a witness may be used.

(4) Where only part of an examination is introduced into evidence, any adverse party may request the introduction of any other part of the examination which qualifies or explains the part introduced.

(5) Where a party introduces in evidence all or any part of the examination of any adverse party, he may rebut that evidence by introducing any other admissible evidence.

(6) The evidence of a party under disability taken on an examination for discovery may only be used at the trial by leave of the trial judge.

(7) Where the deponent has died or is unable to attend at the trial or to testify because of age, infirmity, illness, or where for any other sufficient reason his attendance cannot be obtained or compelled, the trial judge may allow the examination to be used for any purpose by any party.

Subsequent Action

(8) Where an action has been discontinued or dismissed and another action involving the same subject-matter is subsequently brought between the same parties or their representatives or successors in interest, any examination for discovery taken in the former action may be used at the trial of the subsequent action as if it had been taken in the subsequent action.

32.11(8)

- New.

- Working Group. We felt that Williston 32.11(8) was (a) not accurate (e.g. read literally it would have restricted the use of a prior discovery for impeachment to cases where the parties and subject-matter were the same) and (b) it was not clear just what types of cases would meet the criteria of same parties, same subject-matter. We feel revised subrule (a) is clearer in its intent and purpose.

(8) An examination for discovery may be used in a subsequent action involving the same subject matter where the parties to the subsequent action include both the party so examined and the examining party or their successors in interest, in the same manner and to the same extent as in the original action.

DISCOVERY BEFORE COMMENCEMENT OF ACTION

32.12(1) Before an action is commenced, the court may grant leave to a person, on such terms as are just, to examine for discovery any other person who may have information tending to establish the identity of an intended defendant.

(2) Notice of a motion under subrule (1) shall be served on the person to be examined.

(3) An order shall not be made under subrule (1) unless the party bringing the motion establishes that,

- (a) he appears to have a case for relief against the intended defendant;
- (b) he has made reasonable inquiries and is unable to establish the identity of the intended defendant; and
- (c) there is good reason to believe that the person to be examined has knowledge of facts, or has in his possession or control documents, tending to establish the identity of the intended defendant.

32.12

- New.

- Working Group. This provision is modelled after one that is in the New Brunswick draft rules and is included here for discussion purposes. (The U.K. has provisions for discovery before action.) Is it a useful provision?

- Arguments pro

- Could help a plaintiff avoid a limitation defence by a defendant he can not presently identify.
- Could avoid what today may really be actions for discovery or the addition of numerous parties primarily to discover who is the real defendant.

- Arguments con

- Is there a possibility of abuse (but leave of court is necessary)?

(cont'd)

- The proposed new Limitation Act will suspend the running of the limitation period "until he knows or, in all the circumstance of the case, he ought to know the identity of the defendant". However, this Act may be sometime away in terms of enactment. (When the Act is in effect, would the existence of revised rule 32.12 prejudice a plaintiff by allowing a defendant to argue that one of the "circumstances of the case" is that the plaintiff should have sought to leave to examine under 32.12).

RULE 33 PROCEDURE ON ORAL EXAMINATIONS

APPLICATION OF THE RULE

33.01 Subject to the provisions of any other rule, Rule 33 applies to the oral examination or cross-examination, other than in court, of any person [^]liable to be [^]examined under these rules.

OFFICIAL EXAMINER

33.02 Every oral examination to be held in Ontario shall be held before an official examiner or a person designated by an official examiner.

PLACE OF EXAMINATION

33.03 Where the person to be examined resides in Ontario, the examination shall take place in the county in which he resides, unless the court orders otherwise.

[^] APPOINTMENT TO BE OBTAINED

33.04 Where the person to be examined resides in Ontario, the examining party shall obtain an appointment from an official examiner in the county in which the examination is to take place.

33.01

- Williston 33.17 L.R. It is more usual to have a provision stating the application of a rule at the beginning.

33.02

- New. This rule states expressly the assumption underlying our present practice, namely that examinations must be conducted before a court official. The rule is also intended to permit examinations where the official examiner is not present in person, such as examinations in a lawyer's office.

33.03

- Williston 33.01. L.R.

33.04

- Williston 33.02.

RULE 33 PROCEDURE ON ORAL EXAMINATIONS

33.17 Application of the Rule

Subject to the provisions of any other rule, the provisions of this rule shall apply to the oral examination or cross-examination, other than in court, of any person or party liable to be so examined under these rules.

33.01 Place of Examination

Where the person to be examined resides in Ontario, the examination shall take place in the county in which he resides, unless the court otherwise orders.

33.02 Where Appointment to be Obtained

Where the person to be examined resides in Ontario, the examining party shall obtain an appointment from an official examiner in the county in which the examination is to take place.

HOW ATTENDANCE REQUIRED

33.05 (1) Where the person to be examined is a party to the proceeding, a notice of examination (Form 33A) shall be served on his solicitor of record or, where the party acts in person, on him personally.

(2) Where a person is to be examined on behalf of or in place of a party, a notice of examination shall be served on the solicitor of record for the party or served on the person to be examined by leaving a copy with him.

(3) Where the person to be examined is not a party or a person referred to in subrule (2), he shall be served with a summons to witness (Form 33B).

(4) A summons to witness shall be served by leaving a copy with the witness and, at the same time, paying or tendering to him the proper attendance money.

33.05(1)

- Williston 33.03(1). L.R. Note the change in the form name to notice of examination, which the working group felt was a more informative title.

33.05(2)

- Williston 33.03(2), part. L.R. The Williston draft was restricted to corporate officers, etc., but the working group felt that the principle behind the rule was equally applicable to partners, sole proprietors and litigation guardians.

33.05(3)

- Williston 33.03(2), part. L.R.

33.05(4)

- Williston 33.03(3). L.R. Note the change from "conduct money" to "attendance money", the term used in the New Brunswick draft.

33.03 How Attendance Required

(1) Where the person to be examined is a party to the proceeding, a Notice of Appointment (Form 33A) shall be served upon him personally, unless he has a solicitor of record, in which case the Notice shall be served upon that solicitor.

(2) Where the person to be examined is not a party, he shall be personally served with a Summons to Witness (Form 33B) instead of a Notice of Appointment and paid proper conduct money, unless he is to be examined on behalf of a corporate party and is an officer, director or employee thereof, in which case it shall be sufficient to serve a Notice of Appointment on the solicitor of record for the corporate party.

(3) A Summons to Witness shall be served by leaving a copy thereof with the witness personally and, at the same time, paying or tendering to him the proper conduct money, and it shall not be necessary for the process server to produce the original or have it with him.

LENGTH OF NOTICE REQUIRED

33.06 Where the person to be examined resides in Ontario, he shall be given not less than seven days notice of the time and place of the examination, unless the court orders otherwise.

NOTICE TO OTHER PARTIES

33.07 Every other party [^]shall be given notice of the time and place of the examination within the time for giving notice to the person being examined.

EXAMINATIONS ON CONSENT

33.08 [^]A person being examined and all parties to the proceeding [^]may consent to the time and place of the examination and to dispense with notice [^]or to the length and form of notice to be given.

33.06

- Williston 33.04. L.R. WADM questions the increase from 2 to 7 days of the notice period for cross-examinations. The working group felt that the practice now was to give at least 7 days notice except in cases of extreme urgency. In those cases it will still be possible to abridge the notice period on a motion without notice under rule 3.02.

33.07

- Williston 33.05. L.R. The change is to make it clear that the other parties are not served with the same form of notice, but rather they are to be notified at least 7 days before the examination.

33.08

- Williston 33.16(1). L.R. As the provision relates to consent variation of requirements for the conduct of examinations, it has been moved up to follow right after those requirements. Williston 33.08(2) has been deleted as unnecessary because the matters which can be dealt with by consent are spelled out in the rule.

33.04 Length of Notice Required

Where the person to be examined resides in Ontario, he shall be given not less than 7 days notice of the time and place of the examination, unless the court otherwise orders.

33.05 Notice to Other Parties

Every other party to the proceeding shall be given the same notice of the time and place of the examination as that required to be given to the person being examined.

33.16 Examinations on Consent

(1) Notwithstanding the foregoing provisions of this rule, the person being examined and all parties to the proceeding entitled to notice of the examination may consent to the time and place of the examination, and to dispense with notice thereof, or they may consent to the length and form of notice to be given.

(2) All of the applicable provisions of this rule shall apply to any such examination, except to the extent that they have been waived by any such consent.

WHERE PERSON TO BE EXAMINED
RESIDES OUT OF ONTARIO

33.09 (1) Where the person to be examined resides out of Ontario, the court may determine,

- (a) the place of examination;
- (b) the person before whom the examination is to be conducted;
- (c) whether a commission (Form 53A) should be issued under Rule 53; and
- (d) the length of notice to be given.

(2) Where the person to be examined resides out of Ontario ^{is} not a party or a person examined on behalf or in place of a party, the court may fix the amount of attendance money to be paid to him and, if requested, the court shall direct the issuance of a letter of request (Form 53B) under rule 53.03.

33.09(1)

- Williston 33.07(1). L.R. This provision, which relates to the setting up of an examination, has been moved up before Williston 33.06, which deals with the conduct of an examination. Clause (c) is new and is intended to tie the rule in with the commission evidence procedure set out in Rule 53.

33.09(2)

- Williston 33.07(2). L.R. Persons examined on behalf or in place of a party (corporate employee, partner, sole proprietor, litigation guardian) are to be treated as if they were the party and so are not entitled to attendance money here or in rule 33.05.

33.07 Where Person to be Examined Resides out of Ontario

(1) Where the person to be examined resides out of Ontario, the court shall determine,

- (a) the place of examination;
- (b) the person before whom the examination is to be conducted; and
- (c) the length of notice to be given.

(2) Where the person to be examined is not a party, and resides out of Ontario, the court shall fix the amount of conduct money to be paid to him and, if requested, the court shall direct the issuance of a Letter of Request, as provided in Rule 53.

PERSON EXAMINED TO BE SWORN

33.10 (1) The person being examined shall be sworn before he is examined and, where the examination is conducted in Ontario, the oath may be administered by a commissioner for taking affidavits in Ontario.

(2) Where the examination is conducted out of Ontario, the oath may be administered by the person before whom the examination is conducted, a commissioner for taking affidavits in Ontario, or a person authorized to take affidavits in the jurisdiction where the examination is conducted.

33.10(1), (2)

- Williston 33.06(1), 33.07(3). L.R.
- CAB say a problem with a lawyer administering the oath to his own client. The working group does not see this as a problem where the other parties are entitled to be present and there is a reporter recording the evidence. From the Ministry's standpoint, the provision would also obviate the need to appoint court reporters as commissioners for taking affidavits.

33.06 Person Examined to be Sworn

(1) The person being examined shall be sworn before he is examined and, where the examination is conducted in Ontario, the oath may be administered by any commissioner for taking affidavits in Ontario.

33.07(3) Where the examination is conducted out of Ontario, the oath may be administered by any commissioner appointed by the court for taking evidence out of Ontario, any commissioner for taking affidavits in Ontario, or by any person authorized to take affidavits in the jurisdiction where the examination is conducted.

INTERPRETER

33.11(1) Where the person being examined does not understand the language in which the examination is conducted or is deaf or mute, before the person to be examined is sworn, a competent and independent interpreter[^] shall be sworn to interpret accurately the administration of the oath and the questions[^] put to the person being examined and his answers.

(2) Where an interpreter is required by subrule (3) and the person being examined is,

- (a) a party or a person examined on behalf or in place of a party, the party shall provide and pay the interpreter; or
- (b) any other person, the examining party shall provide and pay the interpreter.

33.11

- Williston 33.06(2). L.R.

- Working Group. The issues here are: 1. Who should have to provide the interpreter? 2. Who should have to pay for the interpreter? Sometimes only the witness will know he needs an interpreter, though this is unlikely to come as a surprise where the witness is a party, at least a party with a lawyer. Where the witness is not a party (corporate employee, partner, litigation guardian), it seems somewhat of a burden to require him to produce his own interpreter. The cost of an interpreter will be a recoverable disbursement, but should the examining party have to pay for an interpreter he did not choose? The redraft takes the approach that parties who need an interpreter must provide and pay their own interpreter, whereas other witnesses are provided with an interpreter by the examining party.

(2) Where the person being examined does not understand the language or is deaf or mute, it shall be the responsibility of the person being examined to provide, at the expense of the examining party, a competent and independent interpreter who, before the person to be examined is sworn, shall be sworn to accurately interpret the administration of the oath and the questions to be put to the person being examined and his answers thereto.

PRODUCTION OF DOCUMENTS ON EXAMINATION

33.12 (1) In this rule, "document" has the same meaning as in clause 31.01(b).

(2) The person to be examined shall bring to the examination and produce for inspection all documents in his possession, [^]or control that are not privileged and that he is required to bring by subrule 31.05(2) or by the notice of examination or [^]summons to witness, as the case may be.

(3) Where it is not practicable for the person being examined to bring all such documents with him to the examination, he shall make them available for inspection by the examining party at a mutually convenient time and place before the examination.

(4) Where any person admits, on his examination, that he has in his possession, [^]or control any other document that relates to a matter in issue in the proceeding and is not privileged, he shall produce it for inspection by the examining party forthwith, if he has the document with him, and if not, within two days thereafter.

33.12(1) to (4)

- Williston 33.08. L.R. Subrule (1) is new and defines "document" in the same way as the documentary discovery rule.

33.08 Production of Documents on Examination

(1) The person to be examined shall bring to the examination and produce for inspection all documents in his possession, custody or control, which are not privileged, that he is required to produce by Rule 31.05 (2) or by the Notice of Appointment or the Summons to Witness served upon him, as the case may be.

(2) Where it is not practicable for the person being examined to bring all such documents with him to the examination, he shall make them available for inspection by the examining party at some other mutually convenient time and place prior to the examination.

(3) Where any person admits, upon his examination, that he has in his possession, custody or control any other document relevant to the matters in question in the proceeding, which is not privileged, he shall produce it for inspection by the examining party forthwith, if he has the document with him; and, if not, within 2 days thereafter.

(5) Where it appears that the disclosure of confidential documents would unduly prejudice a party, the court may order that only specified persons be present at the examination, that the documents be disclosed to only specified persons or that the documents be sealed up in the court file.

RE-EXAMINATION

33.13 A person being examined for discovery or cross-examined on his affidavit may be re-examined [^]by his own counsel and by any party adverse in interest to the examining party [^]immediately after the examination or cross-examination.

33.12(5)

- New. The working group proposes this new provision for the protection of confidential business documents in, for example, patent disputes. Is there a need for protection of confidential information that would come out on oral examination? If so, we would propose that both oral and documentary disclosure be dealt with in a new rule following 33.11.

33.13

- Williston 33.09. L.R.
- Working Group. Is it desirable to permit re-examination by another non-adverse party? Could this lead to damage by a blundering counsel or abuse in the form of an attempt at a second examination by a party? Existing rules 332 and 338 do not provide for re-examination by anyone except the party's own counsel, but B.C. and N.B. do.

33.09 Re-Examination

Any person being examined or cross-examined may be re-examined at the conclusion of the examination or cross-examination, by his own counsel, or by any party adverse in interest to the examining party, and such re-examination shall be proceeded with immediately after the examination or cross-examination.

OBJECTIONS

33.14 (1) Where a person being examined objects to answering a question put to him, the question, [^]the nature of the objection and a brief statement of the reason for the objection shall be recorded.

(2) Subject to review on a motion, an official [^]examiner may make rulings in respect of the conduct of an examination, but a ruling as to the propriety of a question to which objection has been taken may [^]be obtained only on motion to the court.

(3) A question objected to may, on consent, be answered subject to the objection, in which case a ruling shall be obtained from the court before the evidence is used at a trial or hearing.

(4) Where a party brings a motion to compel answers to questions to which objections were made, the solicitor for the party shall file a certificate (Form 33C) with the notice of motion stating that since the examination,

(a) the solicitors for the parties have discussed the objections and have been unable to resolve the issue of the objections that are the subject of the motion; or

(b) the solicitor who raised the objections has refused to discuss the objections.

33.14(1) to (3)

- Williston 33.10. L.R.

33.14(4)

- New. Borrowed from U.S. An attempt to reduce the number of motions on objections to answer by expressly requiring attempts to resolve the issues.

33.10 Objections

(1) Where any person being examined objects to answering any question put to him, the question and the nature of the objection and a brief statement of the reason therefor shall be recorded.

(2) Subject to review on a motion to the court, an Official Examiner may make rulings in respect of the conduct of an examination; but, a ruling as to the propriety of any question, to which objection has been taken, may only be obtained by applying to the court.

(3) Any question objected to may, on consent, be answered subject to the objection, in which case a ruling shall be obtained from the court before such evidence is used at a trial or hearing.

33.15(1) An examination may be adjourned by the person being examined or by any party present or represented at the examination for the purpose of bringing a motion for directions as to the continuation of the examination or for an order terminating the examination or limiting its scope where,

- (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;
- (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;
- (c) the examination is excessive in length having regard to the nature of the proceeding;
- (d) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or
- (e) there has been a neglect or improper refusal to produce a relevant document on the examination.

(2) Where the court finds that,

- (a) the improper conduct of a person necessitated a motion under subrule (1); or
- (b) a person improperly adjourned an examination,

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and may fix the costs and the court may make such other order as is just.

33.15

- Williston 33.11. L.R.
- CAB wanted the examiner to grant the adjournment, but the working group could see no good reason to require the examiner to be involved.

33.11 Protective Order

(1) Any examination may be adjourned by the person being examined or by any party present or represented on the examination for the purpose of applying to the court for directions as to the continuation of it, or for an order terminating the examination or limiting the scope thereof where,

- (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;
- (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;
- (c) the examination is excessive in length having regard to the nature of the proceeding;
- (d) many of the answers to the questions are evasive, unresponsive or unduly prolix; or
- (e) there has been a neglect or improper refusal to produce any relevant document in the possession, custody or control of the person being examined, which is not privileged, that he was required to produce by these rules or by the Notice of Appointment or the Summons to Witness served upon him, as the case may be.

(2) On any such motion, the court may order the person whose improper conduct necessitated the motion or the person who improperly brought the motion, as the case may be, to personally pay forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination, and fix those costs, or make such other order as may seem just.

SANCTIONS FOR FAILURE TO
ATTEND OR ANSWER

33.16 Where a person fails to attend at the time and place appointed for his examination or refuses to be sworn, [^] to answer any proper question, [^] to produce any document that he is bound to produce or to comply with any protective order, the court may,

- (a) where an objection is held to be improper, order the person being examined to reattend at his own expense and answer the question and any proper questions arising from his answer; [^]
- (b) if he is a party or a person examined on behalf or in place of a party, dismiss the proceeding or strike out the statement of defence, as the case may be;
- (c) strike out part or all of his evidence, including any affidavit made by him; and
- (d) make such other order as is just.

EXAMINATION TO BE RECORDED

33.17 Every examination shall be recorded in its entirety in question and answer form, unless the court [^] orders or the parties agree otherwise.

33.16

- Williston 33.12. L.R. In clause (b), partners, sole proprietors and litigation guardians are to be treated the same way as corporate employees.

33.17

- Williston 33.13. L.R.

33.12 Penalty for Refusal or Neglect

Where any person refuses or neglects to attend at the time and place appointed for his examination or refuses to be sworn, or to answer any proper question, or to produce any document which he is bound to produce, or to comply with any protective order, the court may,

- (a) where any objection is held to be improper, order the person being examined to re-attend at his own expense and answer that question and any proper questions arising from his answer thereto;
- (b) if he is a party, or an officer, director or employee of a corporate party, dismiss the proceeding or strike out the Statement of Defence, as the case may be;
- (c) strike out his evidence, or any part thereof, including any affidavit made by him; and
- (d) make such other order as may seem just.

33.13 Examination to be Recorded

On every examination, the Official Examiner, or his designee, shall record the entire examination in question and answer form, unless the court otherwise orders, or the parties otherwise agree.

TYPEWRITTEN TRANSCRIPT

33.18 (1) Where requested to do so by a party, the official examiner shall forthwith cause a typewritten transcript of the examination to be prepared.

(2) The transcript shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined.

(3) A copy of the transcript so certified shall be received in evidence, if otherwise admissible, without proof of the signature of the person recording the examination.

(4) Forthwith after the transcript is prepared, the official examiner shall send one copy to each party who has ordered a transcript and, if requested, shall provide a party with an additional copy for the use of the court.

WHEN TRANSCRIPT TO BE FILED

33.19 (1) A copy of the transcript for the use of the court need only be filed at the trial or hearing of the proceeding and then only when a party refers to it, but where it is intended to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office at the place where the motion or application is to be heard at least two days before the hearing.

(2) The transcript of an examination shall not be given to or read by the trial judge until a party refers to it at the trial.

33.18

- Williston 33.14. L.R.

- CAB said the examiner himself should not have to certify the transcript, that the reporter could certify it. Working group agrees.

- Present rule 190 says the examiner has 4 weeks to prepare a transcript, but here subrule (1) says the examiner must forthwith cause a transcript to be prepared. Any problem with this?

33.19

- Williston 33.15. L.R.

- CAB suggests a rule that would forbid filing a transcript before the hearing. Should we take the extra step? The rule has been revised to require the court's copy of the transcript to be filed two days before the hearing, which is when a motion must be set down.

33.14 Typewritten Transcript

(1) Where requested to do so by any party to the proceeding, the Official Examiner, or his designee, shall forthwith prepare a typewritten transcript of the examination.

(2) The transcript shall be certified as correct by the Official Examiner, or by the person recording the examination, but need not be read to or signed by the person being examined.

(3) A copy of the transcript so certified shall be receivable in evidence, if otherwise admissible, without proof of the signature of the Official Examiner or of the person recording the examination.

(4) Forthwith after the transcript is prepared, the Official Examiner shall send one copy thereof to each party to the proceeding who has ordered a transcript and, if requested, provide an additional copy for the use of the court.

33.15 When Transcript to be Filed

(1) A copy of the transcript for the use of the court need only be filed at the trial or hearing of the proceeding and then only where reference is made thereto by any party to the proceeding; provided, however, that where it is intended to make reference thereto on the hearing of any motion or application, a copy of the transcript for the use of the court shall be filed in the Court Office at the place where the motion or application is to be heard, not later than 4 p.m. on the day preceding the hearing thereof.

(2) The transcript of an examination shall not be given to, or read by, the trial judge until reference thereto is made by any party at the trial.

RULE 34 PROCEDURE ON WRITTEN EXAMINATIONS

QUESTIONS

34.01 An examination for discovery by written questions and answers shall be conducted by [^] serving a list of the questions to be answered on the person to be examined and [^] every other party.

ANSWERS

34.02 Written questions shall be answered by the affidavit of the person being examined, and the affidavit shall be served on every party within fifteen days after service of the list of questions.

OBJECTIONS

34.03 An objection to answering a question shall be made in the affidavit of the person being examined along with a brief statement of the reason for the objection.

RULE 34 PROCEDURE ON WRITTEN EXAMINATIONS

34.01

- L.R.

- Throughout this rule the person being examined is described as a "person" not a "party" because he may not always be a party.

34.02

- L.R.

34.03

- L.R.

RULE 34 PROCEDURE ON WRITTEN EXAMINATIONS

34.01 Questions

An examination for discovery by written questions and answers shall be conducted by the examining party serving a list of the questions to be answered upon the party to be examined, and upon every other party.

34.02 Answers

Written questions shall be answered by the affidavit of the party being examined, and that affidavit shall be served on the examining party, and upon every other party within 15 days after service of the list of questions.

34.03 Objections

An objection to answering any question shall be made in the affidavit of the party being examined and a brief statement of the reason therefor shall be stated therein.

FAILURE TO ANSWER

34.04 (1) Where [^]the examining party is not satisfied with an answer or where an answer suggests a new line of questioning, the examining party may, within ten days of the receipt of the answer, submit a further list of written questions which shall be answered within fifteen days thereafter.

(2) Where the person being examined fails to answer a question or where his answer to a question is insufficient, the court may, on such terms as are just, order him to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.

(3) Where it appears from reading all the answers to the written questions that they are evasive, unresponsive or otherwise unsatisfactory, the court may order the person examined to submit to oral examination on such terms as to costs or otherwise as are just.

(4) Where a party brings a motion to compel answers to questions to which objections were made, the solicitor for the party shall file a certificate (Form 33C) with the notice of motion stating that since the examination,

(a) the solicitors for the parties have discussed the objections and have been unable to resolve the issue of the objections that are the subject of the motion; or

(b) the solicitor who raised the objections has refused to discuss the objections.

34.04(1) - (3)

- L.R.

34.03(4)

- new, analogous to a similar provision in the oral examination rule (see 33.13(4)).

34.04 Failure to Answer

(1) Where, upon receipt of the answers, the party examining is not satisfied with the answer to any particular question or where the answer to some particular question suggests a new line of questioning, the examining party may, within 10 days of the receipt of that answer, submit a further list of written questions which shall be answered within 15 days thereafter.

(2) Where the party being examined fails to answer any question or where his answer to any question is insufficient, the court may, upon such terms as may seem just, make an order requiring him to answer such question, or to make a further answer thereto, or to answer any other question either by affidavit or on oral examination.

(3) Where it appears from reading all the answers to the written questions that they are evasive, unresponsive or otherwise unsatisfactory, the court may make an order requiring the party so examined to submit to oral examination upon such terms as to costs or otherwise as may seem just.

SANCTIONS FOR REFUSAL OR NEGLECT

34.05 Where any person fails to answer a question properly put to him on a written examination or to produce any document he is bound to produce, he and the party on behalf or in place of whom he is examined are liable to the sanctions imposed by rule 33.15.

FILING QUESTIONS AND ANSWERS

34.06 Rule 33.18 applies, with necessary modifications, to the filing of written questions and answers for the use of the court.

34.05

- L.R.

34.06

- new and necessary. The Williston Rules were silent on this subject.

34.05 Penalty for Refusal or Neglect

Where any person refuses or neglects to answer any question properly put to him on a written examination or to produce any document he is bound to produce, he and the party on whose behalf he is being examined shall be liable to the same penalty for such refusal or neglect as in the case of an oral examination.

RULE 35 INSPECTION AND PRESERVATION OF PROPERTY

ORDER FOR INSPECTION

35.01 (1) Where the inspection of [^]real or personal property appears to be necessary for the proper determination of an issue in an action, the court may, on the motion of a party, make an order for the inspection of the property by a party or his [^]representative.

(2) For the purpose of the inspection, the court may,

(a) authorize [^]entry on any real property in the possession of a party or in the possession of any person not a party;

(b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; or

(c) permit the taking of [^]samples, the making of observations or the conducting of [^]tests or experiments in respect of the property.

(3) The order shall specify the time, place and manner of making the inspection and may prescribe such other terms and conditions, including the payment of compensation, as are just.

(4) Where the property to be inspected is in the possession of a person who is not a party, no order for inspection shall be made without notice to the person, unless the giving of [^]notice, or the time required to do so, might entail serious consequences to the party seeking the order.

RULE 35 INSPECTION AND PRESERVATION OF PROPERTY

Redrafting of the language is the only change in this rule.

RULE 35 INSPECTION AND PRESERVATION OF PROPERTY

35.01 Order for Inspection

(1) Where the inspection of any real or personal property appears to be necessary for the proper determination of any issue in an action, the court may, upon the motion of any party, make an order for the inspection of any such property by any party or his duly authorized representative.

(2) For the purpose of any such inspection, the court may,

(a) authorize the entry upon any real property in the possession of any party or in the possession of any person not a party;

(b) permit the measuring, surveying, or photographing of the property in question, or of any particular object or operation thereon; or

(c) permit the taking of any samples, the making of any observations or the conducting of any tests or experiments in respect of such property.

(3) The order shall specify the time, place and manner of making the inspection and may prescribe such other terms and conditions, including the payment of compensation, as to the court may seem just.

(4) Where the property to be inspected is in the possession of any person not a party, no order for inspection shall be made without notice to such person, unless the giving of such notice, or the time required to do so, might entail serious consequences to the party seeking the order.

ORDER FOR PRESERVATION

35.02 The court may make an order for the custody, detention or preservation of any personal property in question in the action or relevant to an issue in the action and, where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

SPECIFIC FUND

35.03 Where the right of a party to a specific fund is in dispute, the court may order the fund to be paid into court or otherwise secured on such terms, if any, as are just.

RECOVERY OF PERSONAL PROPERTY
SUBJECT TO LIEN

35.04 (1) Where a party from whom the recovery of personal property is claimed does not dispute the title of the party making the claim, but claims the right to retain the property as security for money alleged to be owing to him, [^] the court may order the party claiming recovery of the property to pay into court or otherwise give security for the money ^{*} alleged to be owing and such further sum, if any, for interest and costs as the court may direct.

(2) On compliance with the order, the property in question shall be delivered to the party claiming recovery [^] and the money in court or the security [^] shall await the outcome of the action.

35.02 Order for Preservation

The court may make an order for the custody, detention or preservation of any personal property in question in the action or relevant to any issue in the action and, where any such property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order the sale thereof in such manner and upon such terms as to the court may seem just.

35.03 Specific Fund

Where the right of any party to a specific fund is in dispute, the court may order the fund to be paid into court or otherwise secured on such terms, if any, as to the court may seem just.

35.04 Recovery of Personal Property Subject to Lien

Where any party from whom the recovery of personal property is claimed does not dispute the title of the party making the claim, but seeks to retain the property as security for monies alleged to be owing to him, by virtue of a lien or otherwise, the court may order the party claiming recovery of the property to pay into court, or otherwise secure the monies alleged to be owing and such further sum, if any, for interest and costs as the court may direct. Upon compliance with the order, the property in question shall be delivered to the party claiming recovery thereof and the monies in court or the security as furnished shall abide the event of the action.

REVISED RULES OF CIVIL PROCEDURE

RULE 36 MEDICAL EXAMINATION OF PARTIES

DEFINITION

36.01 For the purpose of this rule, "legally qualified medical practitioner" includes a person licensed to practise dentistry under the Health Disciplines Act.

WHERE ORDER TO BE MADE

36.02(1) A motion for an order for the physical or mental examination of a party whose physical or mental condition is in issue in an action shall be on notice to every party and may be made to the court.

(2) Where the question of the physical or mental condition of a party has not been raised by him but arises in an allegation made by another party, an order under subrule (1) may be made only where the court is satisfied that there is good reason to believe that there is real substance to the allegation and that the allegation is relevant to a material issue in the action.

COMMENTS

RULE 36 MEDICAL EXAMINATION OF PARTIES

The Minister is of the view that the provisions authorizing medical examinations (Williston 36.02(1)) and defining the scope of the examination (Williston 36.05(2)) are to be included in the Judicature Act and not in the rules.

The rule has been redrafted in light of this decision and in such a way as to attempt to minimize the inconvenience resulting from having two sets of provisions (the Act and the Rules) regulating medical examinations. The Judicature Act provisions will be essentially Williston 36.02(1) and 36.05(2).

36.01

- L.R.

36.02(1)

- Williston 36.02(1) and 36.04(1), L.R.

36.02(2)

- L.R.

WILLISTON'S PROPOSED RULES

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RULE 36 MEDICAL EXAMINATION OF PARTIES

36.05(2) Where expressly authorized to do so by an order made under this rule, the examining medical practitioner may,

- examine hospital records and X-rays previously made or taken in respect of the party being examined;
- have samples taken of blood and other body fluids and cause analyses thereof to be made; and
- cause any other test recognized by medical science to be made including, without restricting the generality of the foregoing, X-rays, electrocardiographs, electroencephalographs and psychological tests; provided, however, that no party shall be required to submit to any test which is unduly painful or potentially dangerous.

36.01 Definition

For the purpose of this rule, *legally qualified medical practitioner* includes a person licensed to practise dentistry under *The Health Disciplines Act, 1974*.

36.02 Who May be Examined

(1) Where the physical or mental condition of any party to an action is in issue, the court may order him to submit to a physical or mental examination, or both.

36.04 Order for Examination

(1) An order for the physical or mental examination of a party shall only be made upon the motion of an adverse party and upon notice to all other parties to the action.

36.02 (2) Where the initial allegation concerning the physical or mental condition of a party to an action originates in the pleading of an adverse party, an order under paragraph (1) may only be made where the court is satisfied that there is good reason to believe that there is real substance to the allegation and that the allegation is relevant to a material issue in the action.

WHO MAY EXAMINE

36.03 A physical or mental examination of a party ordered by the court under Rule 36 shall be conducted by one or more legally qualified medical practitioners who have consented to conduct the examination and who are appointed by the court for that purpose.

ORDER FOR EXAMINATION

36.04 (1) The order shall specify the time, place, [^]scope and purpose of the examination, and shall name the medical practitioner or practitioners by whom it is to be made.

(2) The expense of the examination shall be paid by the party obtaining the order but, unless otherwise ordered, the expense and the costs of the motion shall be costs to him in the cause.

(3) The court may order a second examination or further examinations on such terms as to costs or otherwise as are just.

SCOPE OF EXAMINATION

36.05 (1) The order shall set out specifically the measures authorized by section 00 of the Judicature Act that are to be taken on the examination.

36.03

- L.R.
- Will the specific requirement re the consent of the doctor, necessitate the filing of his consent on the motion and increase costs? Is this requirement really essential?

36.04

- Williston 36.04(2) - (4), L.R.

36.05(1)

- New in lieu of Williston 36.05(2) to accommodate the transfer of the provision to the Judicature Act.

36.03 Who May Examine

A physical or mental examination of a party ordered by the court under this rule shall be conducted by one or more legally qualified medical practitioners appointed by the court for that purpose.

36.04 (2) The order shall specify the time, place and scope of the examination, and shall name the medical practitioner or practitioners by whom it is to be made.

(3) The expense of the examination shall be paid by the party obtaining the order but, unless otherwise ordered, such expense and the costs of the motion shall be costs to him in the cause.

(4) The court may order a second examination or further examinations on such terms as to costs or otherwise as may seem just.

(2) Unless otherwise ordered, the party to be examined shall provide to the party obtaining the order, at least seven days before the day appointed for the examination, a copy of any report made by any medical practitioner who has treated the party to be examined in respect of the mental or physical condition in issue, and the party obtaining the order shall make a copy of every such report available to the medical practitioner appointed to make the examination, before the examination begins.

(3) In conducting an examination, the examining medical practitioner may ask and the party being examined shall answer any questions relevant to the scope and purpose of the examination.

36.05(2)

- Williston 36.05(3).

- Working Group

The intention of this provision is that the party being examined is obligated to provide only the reports of doctors who have treated him and not the reports of those who have examined him but not treated him (i.e. non-treating specialists who have given the injured plaintiff's lawyer a medical-legal report). Assuming the distinction should be made (we believe it is justified) is it really clear from the language of the rule? How can it be made clearer?

- in response to Judge Phelan's comment the time of it has been lengthened from two to seven days. Is this wise?

36.05(3)

- Williston 36.05(1), L.R.

- D. Miller points out that at present the Judicature Act s. 78(3) specifically makes such provision admissible evidence. Will there be a similar provision in the new Act or should it be dealt with here.

~~36.05~~(3) Unless otherwise ordered, the party to be examined shall deliver to the party obtaining the order, at least 2 days before the day appointed for the examination, a copy of any report made by any medical practitioner who has treated the party to be examined in respect of the mental or physical condition in issue, and the party obtaining the order shall make a copy of every such report available to the medical practitioner appointed to make the examination, before the examination begins.

36.05 Scope of Examination

(1) In conducting an examination pursuant to an order under this rule, the examining medical practitioner may ask the party being examined any questions relevant to the purpose of the examination, and he shall answer all such questions.

WHO MAY ATTEND ON EXAMINATION

36.06 No person other than the person being examined, the examining medical practitioner, his nurse or assistant and a medical practitioner nominated by the person being examined, if any, shall be present at the examination, unless the court orders otherwise.

MEDICAL REPORTS

36.07 (1) After conducting an examination under Rule 36, the examining medical practitioner shall prepare a written report setting out his observations, the results of any tests made and his conclusions, diagnosis and prognosis relevant to the scope and purpose of the examination and shall forthwith deliver the report to the party who obtained the order.

(2) The party who obtained the order shall forthwith serve the report on every other party.

36.06

- L.R.

36.07(1) and (2)

- Williston 36.07, subruled and L.R.

36.06 Who May Attend on Examination

No person other than the person being examined, the examining medical practitioner, his nurse or assistant and a medical practitioner nominated by the person being examined, if any, shall be present at the examination of a party made pursuant to an order under this rule, unless the court otherwise orders.

36.07 Medical Reports

After conducting an examination pursuant to an order under this rule, the examining medical practitioner shall prepare a written report setting out his observations, including the results of any tests made and his conclusions therefrom as well as his diagnosis and prognosis, and shall forthwith deliver the report to the party obtaining the order. Upon receipt thereof, a copy of the report shall be served by the party obtaining the order on every other party to the action.

(3) On serving the report, the party who obtained the order may require the party examined to provide him with the conclusions, diagnosis and prognosis and a copy of any report of any medical practitioner who has examined the party examined, other than a practitioner whose evidence the party examined undertakes not to introduce at the trial or hearing.

PENALTY FOR FAILURE TO COMPLY

36.08 Where a party fails to comply with Rule 36 or [^]an order made under Rule 36, he is liable, if a plaintiff, to have his action dismissed or, if a defendant, to have his statement of defence struck out.

EXAMINATION BY CONSENT

36.09 The provisions of Rule 36 [^]apply to a physical or mental examination conducted by the consent in writing of the parties, except to the extent that they have been waived by the consent.

36.07(3)

- new.

- Working Group

Under the Williston scheme in Rule 36 (using the example of a typical personal injury case) the defendant would be entitled to see the reports of the plaintiff's treating doctors only prior to the defence medical, and after the defence medical he must hand over to the plaintiff the "defendant's expert report" without any right to then see the plaintiff's non-treating expert's report. The Working Group questions this and 36.07(3) is included in the revised rules for discussion, as a possible remedy to this state of affairs. Note that it is so phrased as to allow the plaintiff the same right to "bury an adverse expert's opinions" as is afforded on examination for discovery (see R.32.06(3)). In the absence of this provision the defendant will be entitled to see the reports of the plaintiff's experts who will testify at trial, ten days before trial (see Williston 52.01). The net effect of the proposed provision then is really to accelerate disclosure by the plaintiff to facilitate settlement.

36.08 and 36.09

L.R.

36.08 Penalty for Failure to Comply

Where a party fails to comply with this rule or with any order made pursuant thereto, he shall be liable, if a plaintiff, to have his action dismissed or, if a defendant, to have his Statement of Defence struck out.

36.09 Examination by Consent

The provisions of this rule shall apply to any physical or mental examination conducted by the consent in writing of the parties, except to the extent that they have been waived by any such consent.

MOTIONS AND APPLICATIONS

RULE 37 JURISDICTION AND PROCEDURE ON MOTIONS

MOTIONS AND APPLICATIONS

RULE 37 JURISDICTION AND PROCEDURE ON MOTIONS

RULE 37 JURISDICTION AND PROCEDURE
ON MOTIONS- Working Group

In the redraft of this rule the terminology used is that of a motion being "brought" Subsequent to the redraft, the Working Group agreed to recommend a return to the Williston terminology i.e. a motion will be "made" and where appropriate "make" or "move" will be used. If this is agreeable to the Sub-committee all rules will be drafted or redrafted using this terminology.

NOTICE OF MOTION

37.01 A motion shall be brought by a notice of motion (Form 37A).

37.01

- L.R.

37.02

- Williston 37.02 has been sub-ruled, re-organized and L.R.

JURISDICTION TO HEAR A MOTION

In General

37.02 (1) A judge of the court in which a proceeding is pending has the jurisdiction to hear any motion in the proceeding.

37.02(1)

- language substantially redrafted.

37.01 Notice of Motion

A motion shall be made by a Notice of Motion (Form 37A).

37.02 Jurisdiction to Hear a Motion

(1) *In General*

A judge of the court in which a proceeding is pending has the jurisdiction to hear any motion in the proceeding and, where the proceeding is pending in the Supreme Court, a master, a local judge or a local master may hear a motion in the proceeding, if within his jurisdiction as defined by this rule.

Jurisdiction of a Master

(2) A master has jurisdiction to hear a motion in a proceeding in the Supreme Court,

(a) where the motion is for summary judgment or for judgment on consent, unless one of the parties is under a disability; or

(b) where the motion relates to the conduct of the proceeding, except a motion,

(i) where the power to grant the relief sought is, by statute or these rules, conferred upon a judge,

(ii) relating to the liberty of a subject,

(iii) by way of or in the nature of an appeal, or

(iv) to abridge or extend a time prescribed by a judgment that a master could not have granted.

37.02(2)(a)

- J. Morden asked why masters should have jurisdiction to grant summary judgment but not to grant judgment on motion after signing of default.

Working Group. The only explanation we can see is the s.96 problem. In the face of s.96, is the argument for giving the master summary judgment jurisdiction any stronger than for giving him the default judgment on motion jurisdiction?

37.02(2)(b)(iv)

- Is new. Williston 3.02 which dealt with this subject has been deleted. The subject is now dealt with in part here and also in 37.02(5).

(2) *Jurisdiction of a Master*

(a) A master has jurisdiction to hear any motion in a proceeding in the Supreme Court for summary judgment or for judgment on consent, unless one of the parties thereto is under disability, and any motion relating to the conduct of the proceeding, except a motion,

(i) where the power to grant the relief sought is, by any statute or by these rules, conferred upon a judge;

(ii) relating to the liberty of a subject; or

(iii) by way of, or in the nature of an appeal.

(3) For the purposes of clause (2)(b), "the conduct of the proceeding" means any step in the proceeding pending the trial or hearing, including a motion for interim relief, or after the trial or hearing that relates to the enforcement of a judgment granted in the proceeding.

37.02(3)

J. Morden raised the question of whether there is a conflict between this rule, s.22(1) of the Judicature Act and Rule 64. Working Group.

J. Morden's concern appears to be whether the masters are by 37.02(2) and (3) given jurisdiction in respect of the conduct of appeals (which is governed at least in part by s.22 - jurisdiction in single judge of the relevant appellate court). We do not think there is a problem here. 37.02 (3) seems very carefully not to refer to, or extend to appeals (prior to trial, and after trial if it relates to enforcement). Rule 64 gives the master jurisdiction re stay of execution pending an appeal but surely this relates to the enforcement of a judgment.

(b) For the purposes of clause (a), *the conduct of the proceeding* means any step in the proceeding, including a motion for interim relief, pending the trial or hearing thereof, and also includes any step in the proceeding after the trial or hearing thereof relating the enforcement of a judgment granted in any such proceeding.

(4) A master has jurisdiction to hear a motion to change the place of trial in a county court action, or to order the consolidation or trial together of proceedings pending in two or more county courts.

Jurisdiction of a Local Judge

(5) Outside the Judicial District of York, a local judge has all the jurisdiction of a judge of the Supreme Court to hear a motion in a proceeding in the Supreme Court where,

- (a) the proceeding was commenced in his county;
- (b) the solicitor of record for any party practises law in his county;
- (c) any party resides in his county; or
- (d) all the parties consent,

except a motion by way of, or in the nature of, an appeal or a motion to set aside or vary the judgment of a judge of the Supreme Court made following a trial.

37.02(5)

- Williston 37.02(3), L.R. and reorganized with some substantive change.
- L. Perry expressed concern that a local judge could now hear matters without the O.G.'s consent which in the past had allowed the O.G. to obtain a continuity of orders throughout the province. Working Group. We cannot see how any requirement of the O.G.'s consent is compatible with the new scheme.

(cont'd)

- (c) In addition to his jurisdiction in respect of a motion in a proceeding in the Supreme Court, a master may hear a motion to change the place of trial in a county court action, or to order the consolidation or trial together of proceedings pending in two or more county courts.

(3) *Jurisdiction of a Local Judge*

Except in the Judicial District of York, a local judge has the same jurisdiction as a judge of the Supreme Court to hear any motion in a proceeding in the Supreme Court where the proceeding was commenced in his county or where the solicitor of record for any party to the proceeding practises law in his county or where any party to the proceeding resides in his county or where all the parties to the proceeding consent, except a motion by way of, or in the nature of, an appeal or a motion to vary the judgment of a judge of the Supreme Court.

Judge Kurisko suggested that because the present caselaw denies local judges jurisdiction to grant final orders or judgments (or to hear applications) it might be advisable to specifically spell out that they have this power. Working Group. We feel that the relevant provisions as drafted leave no question but that local judges have this jurisdiction.

e.g. 37.02(3)- gives the local judge all the jurisdiction of High Court judges with limited exception. 38.02(2) gives local judges application jurisdiction which will necessarily involve power to grant final judgments. (Judicature Act s.40(2)(h) specifically authorizes this

grant).

37.12 permits a local judge to turn a motion into a motion for judgment.

- J. Morden suggested that motions "relating to the liberty of the subject" should be excepted from the local judge's jurisdiction to comply with the relevant rule making power in Judicature Act s.40(2)(h).
- Working Group. Local judges should have this jurisdiction. It is important re judgment debtor examinations and they have powers over the liberty of the subject as county court judges. Better solution is to amend Judicature Act s.40(2)(h).
- Working Group. The limitation on the local judge's power to set aside or vary the judgment of a Supreme Court judge has been changed. Is the change acceptable?

- Working Group. Query whether the power to grant "leave to appeal" should also be excepted specifically from the jurisdiction of a local judge? See 63.03(1) as redrafted pursuant to comment below. Should a similar exception be made from the jurisdiction of the master for symmetry (but what of 57.02(16)?

Jurisdiction of a local Master

(6) Outside the Judicial District of York, a local master has the same jurisdiction as a master to hear a motion in a proceeding in the Supreme Court where,

- (a) the proceeding was commenced in his county;
- (b) the solicitor of record for any party practises law in his county;
- (c) any party resides in his county;
or
- (d) all the parties consent.

37.02(6)

- Williston 37.02(4), L.R. Exception re J.D. of York added per G. Watson's comment because county court judges in York are in fact local judges.

(4) *Jurisdiction of a Local Master*

A local master has the same power and authority to hear any motion in a proceeding in the Supreme Court as a master where the proceeding was commenced in his county or where the solicitor of record for any party to the proceeding practises law in his county or where any party to the proceeding resides in his county or where all the parties to the proceeding consent.

PLACE OF HEARING OF SUPREME COURT MOTIONSMotion Made Without Notice

37.03 (1) A motion made without notice in a proceeding in the Supreme Court may be brought in the county in which,

- (a) the proceeding was commenced;
- (b) any party resides; or
- (c) the solicitor of record for any party practises law.

Motion Made on Notice

(2) A motion made on notice in a proceeding in the Supreme Court shall be brought,

- (a) in the county where the solicitor of record for any responding party practises law or, if a responding party acts in person, in the county where he resides; or
- (b) where there is no responding party residing in Ontario or represented by a solicitor of record in Ontario, in the county where the proceeding was commenced or where the solicitor of record for any party practises law,

unless the parties agree otherwise or the court orders otherwise on grounds of urgency, hardship (or other sufficient cause).

37.03

- L.R. and some changes.
- Headings have been changed to make it clearer that the rule deals with two quite distinct subjects - place of hearing and to whom motions are to be made at the place of hearing.
- Working Group. This rule was developed by the Williston Committee in response to very strong representations from non-Toronto solicitors from all parts of the province. Essentially it requires a party who brings a contested motion to bring it where the respondent's solicitor practises. We support this principle but we feel the Sub-committee should at least consider whether the mechanics of the operations have been made workable. We have identified one problem with

37.03 Where a Motion in the Supreme Court May be Brought

(1) *Where Made Without Notice*

A motion made without notice in a proceeding in the Supreme Court may be brought in the county in which the proceeding was commenced or where any party to the proceeding resides or where the solicitor of record for any party to the proceeding practises law.

(2) *Where Made on Notice*

Unless the parties to the motion otherwise agree, a motion made on notice in a proceeding in the Supreme Court shall be brought,

- (a) in the county where the solicitor of record for any respondent to the motion practises law, or, where any respondent is not represented by a solicitor in the county where the respondent resides; or
- (b) where there is no respondent to the motion residing in Ontario or represented by a solicitor of record in Ontario, in the county where the proceeding was commenced or where the solicitor of record for any party to the proceeding practises law.

the Williston scheme which we suggest requires correction. Different appeal routes were provided from interlocutory judgments of a local judge (to a High Court judge, 63.01) and from the interlocutory judgments of a High Court judge (to the Divisional Court with leave, Judicature Act s.18). We believe this approach is wrong. It would mean that if a R. 126 motion was brought before a High Court judge in Toronto and refused, the appeal would be to the Divisional Court with leave; but if the motion were brought before a local judge in Milton (and a party may often be required to do so) and refused, the appeal would be to a High Court judge. The proposed solution is to make the appeal routes for interlocutory judgments of High

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
	Court and local judges the same. [Is this a sound proposal? Or is the Williston scheme, though difficult to explain or defend in principle, justified on a pragmatic basis (i.e. a more simple and straightforward appeal route, albeit to a lower court). However, keep in mind that in most interlocutory matters the local judge will hear the motion as local master where the appeal would be to a High Court judge.] The changes necessary to give effect to the same appeal route approach would be as follows: Judicature Act s.15(1)(d) - delete "in respect of a claim made in a divorce proceeding" s.18(1)(c) - add "or local judge" s.18(1)(d) - delete "local judge and "except those etc."	

(3) Where a party has served a notice of motion naming a place of hearing in accordance with subrule (2), any other party may bring a motion at the same place and time.

Rule 63.01(1) and (2) - delete "local judge" (also from heading)

Rule 63.03(1) - add "a local judge" in line 2 (and to heading) and add in second last line after "High Court", and where the appeal is from a High Court judge, leave shall be obtained from a judge".

- John Morden raised the problem of cross motions having to be made returnable in different counties e.g. a Toronto plaintiff brings a motion in Sudbury because the respondent's solicitor practises there. If the Sudbury party wants to bring a cross-motion does he have to bring it in Toronto? In most cases the "consent" exception would

have dealt with this problem.

However, we feel a specific provision should be added to give the respondent the right to have the cross-motion heard in Sudbury. See 37.03(3)

Judge Kurisko raised the problem of "retaliatory" motions (his recent experience where a motion was made in Sudbury to strike out a jury notice and the Toronto respondent brought a motion returnable in Toronto at an earlier date to confirm the jury notice). Under the Williston scheme retaliatory motions of this kind will rarely be a problem because of the basic rule that the "moving party must go to the respondent's place". In the above example the original motion would have to have been brought in Toronto, and any retaliatory motion, in Sudbury. So nothing is gained by retaliatory motions.

- Working Group. We believe the new system cannot work without power in the court to permit a motion to be brought other than as provided in 37.03(2). For example, cases of urgency (short of urgency that would justify a motion without order). Also there are situations where the reason supporting the rule would itself suggest relief against the literal rule e.g. 5 Toronto defendants moving against one Windsor plaintiff. Surely all 5 defendants should not have to travel to Windsor. Drafting the court's power to relieve is not easy. We have said "urgency, hardship or other sufficient cause". Is there better wording? Also there is potential for abuse in giving the court a specific power to relieve

(particularly if phrased generally)
 eg. a Toronto moving party could
 defeat the whole purpose of the rule
 by moving against a Sudbury respondent
 in Toronto and coupling it with an
 unmeritorious motion for leave to
 bring it in Toronto because the
 Sudbury respondent would have to
 appear on this motion in Toronto.
 Probably this can be dealt with by
 a stiff cost order and jurisprudence
 as to when relief should be given
 against the place of hearing require-
 ments, will develop.

To Whom Motion to be Made

(4) Where a motion in a proceeding in the Supreme Court is properly brought in the Judicial District of York, it shall be brought before a master, if within his jurisdiction and, if not, it shall be made to a judge of the Supreme Court.

(3) *Where Brought in the Judicial District of York*

Where a motion in a proceeding in the Supreme Court is properly brought in the Judicial District of York, it shall be made to a master, if within his jurisdiction; and, if not, it shall be made to a judge of the Supreme Court.

(5) Where a motion in a proceeding in the Supreme Court is properly brought in a county other than the Judicial District of York it shall be brought before,

(a) a local master, if the motion is within his jurisdiction;

(b) a local judge, if the motion is within his jurisdiction and not within the jurisdiction of a local master; or

(c) a judge of the Supreme Court, in any other case.

(6) Where on a motion a local judge makes an order that he could have made as a local master, for the purposes of an appeal under Rule 63 the order shall be deemed to have been made by a local master.

37.03(5) and (6)

Working Group. If our suggestion for making the appeal routes from interlocutory judgments of High Court and local judges the same is accepted

this will mean the appeal routes re interlocutory judgments of local judges and local masters would be different. Consequently local judges who are also local masters will have to be careful as to the capacity in which they make orders (since they will always have local judge jurisdiction if they have local master jurisdiction). To alleviate this problem we propose the inclusion of 37.03(6) if the appeal route change is made.

(4) Where Brought Outside the Judicial District of York

Where a motion in a proceeding in the Supreme Court is properly brought in a county other than the Judicial District of York, it shall be made to a local master of that county, if within his jurisdiction; and, if not, it may be made to a local judge of that county or to a judge of the Supreme Court sitting in that county.

CONTENT OF NOTICE

37.04 Every notice of motion (Form 37A) shall state the relief sought and shall specify with particularity any irregularity complained of or any objection to be relied on, as well as the grounds [^]to be argued, including reference to any statutory provision or rule [^]to be invoked.

SERVICE OF NOTICE

Required as General Rule

37.05 (1) The notice of motion shall be served on every other party and any other person affected by the order sought, unless otherwise provided in these rules.

37.04

- L.R., Form added.
- In response to J. Morden's comment the Form will be rewritten to conform with the rule.

37.05

- L.R., heading changed and some change of substance.
- The rule has been redrafted to deal with problems raised by J. Morden.
- 37.05(1) has been redrafted to require that all parties be served on every motion. We believe a party should be entitled to notice of everything that is going on in the action. Of course, if he is unaffected by the order sought he should not contest it or appear on it.

37.04 Content of Notice

Every Notice of Motion shall state the relief sought, and shall specify with particularity any irregularity complained of or any objection to be relied on, as well as the grounds intended to be argued, including reference to any statutory provision or rule sought to be invoked.

37.05 Service of Notice(1) Where Required

The Notice of Motion shall be served on any person, including a party to the proceeding, affected by the order sought, unless otherwise ordered.

Where Not Required

(2) Where the nature of the motion or the circumstances of the case render service of the notice of motion impractical or unnecessary, the court may make an order without notice.

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

(4) Where an order is made without notice to a person affected by the order the order shall be forthwith served on the person unless otherwise provided in the order or in these rules.

37.05(2) and (3) is Williston 37.05(2)

(a) sub-ruled to provide that in cases under Sub-rule (3) the order should be an interim one (as under R.218 today).

37.05(4)

- New. We feel that this is a sound general rule and the court could order otherwise where it is inappropriate or unnecessary.

Williston 37.05(1)(b)

- has been moved, since it does not directly have to do with service of notice. It is now 37.14.

(2) *Where Not Required*

(a) Where the nature of the motion or the circumstances of the case render service of the Notice of Motion impractical or unnecessary, or where the delay necessary to effect such service might entail serious consequences, the court may make an order without notice.

(b) Where a case of extreme urgency exists, a motion may be made before the commencement of a proceeding upon the undertaking of the applicant to commence the proceeding forthwith.

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

(a) adjourn the motion and direct that the notice of motion be served; or

(b) direct that any order made on the motion be served,

in such manner as is just.

Time for Service

(6) A notice of motion shall be served at least three days before the date on which it is to be heard.

RESCINDING ORDERS MADE WITHOUT NOTICE

37.06 (1) Any person affected by an order made without notice to him or any person who has failed to appear on a motion through accident, mistake or insufficient notice may move to set aside or vary the order by notice of motion served forthwith after the order came to his attention and naming the first available hearing date.

(2) The motion may be brought before the judge or officer who made the order or any other judge or officer having jurisdiction.

(3) *Where Notice Ought to be Served*

Where it appears to the court that the Notice of Motion ought to be served on a person who has not been served, and who may be affected by the order sought, the court may direct that the Notice of Motion, or any order made on the motion, be served on that person in such manner as may seem just.

(4) *Time for Service*

A Notice of Motion shall be served at least 3 days before the date upon which it is returnable.

37.06

Williston 37.07 relocated so as to put it next following the rule dealing with service of notice and L.R.

Working Group. The formula as to the time with which the motion must be made and heard has been changed because counsel does not always control the hearing date eg. in Toronto Motions Court.

37.06(2) Does this rule gel with 37.03(1) and (2)?

37.07 Rescinding Orders Made Without Notice

(1) Any person affected by an order made without notice to him or any person who has failed to appear on a motion through accident, mistake or insufficient notice, may apply to rescind or vary the order by Notice of Motion served within 10 days and returnable within 15 days after the order came to his attention.

(2) The motion may be made to the judge or officer who made the order, or to any other judge or officer having jurisdiction.

FILING OF NOTICE OF MOTION

37.07 (1) The notice of motion shall be filed, with proof of service where it has been served, at least two days before the hearing date in the court office at the place where the motion is to be heard.

37.07

- Williston 37.06, substantial redrafting.
- some redrafting to take account of J. Morden's comments. [Does filed need to be defined in Rule 1 or is it already sufficiently taken care of in 4.08(4)? But will people find it here?
- in response to Courts Administration the time for filing has been changed from "the day before" to "two days before". Is this wise?
- Williston 37.06(2) has been deleted. Working Group. We see no reason why motions without notice should be treated differently as a general rule. Where late filing is convenient for the court and parties, time can be abridged under 3.02.

37.06 Filing of Notice

(1) Where the Notice of Motion has been served, or where service thereof is required, it shall be filed with proof of service at least the day before the date upon which it is returnable.

(2) Where service of the Notice of Motion is not required, it shall be filed on or before the hearing thereof.

(2) On filing of the notice of motion under subrule (1), the motion shall be set down by the registrar for hearing (unless the motion is to be disposed of on the papers without a hearing).

RECORD ON MOTIONS TO SUPREME COURT JUDGE

37.08 (1) Where a motion (on notice) is brought in the Supreme Court before a judge (or local judge) in Toronto, Ottawa or London, the moving party shall, not later than the day before the hearing, serve on every other party and deposit with the registrar a motion record for the use of the court consisting of,

- (a) an index;
- (b) a copy of the notice of motion;
- (c) a list of all relevant transcripts of evidence in chronological order, but not the transcripts themselves; and
- (d) a copy of all affidavits and other material filed for use on the motion.

- 37.07(2) is new to spell out what happens on the filing of the notice.
- J. Morden raised the question of whether the Toronto hearing date practice re motions should be written into this rule. Working Group felt no. Is this the right answer?

37.08

- New. The Williston Rules made no provision for a record on motions (as opposed to applications, see 38.07) except appeals by motion to a High Court judge (see 63.02).

This new rule was added in response to J. Morden's comment and in light of recent amendments to present R.238 (after which it is modelled).

Because it increases the costs of

proceedings the requirement of a record has been limited to where it appears to be functionally necessary to allow judges to prepare i.e. Supreme Court Motions Court in Toronto, Ottawa and London. (Do Ottawa and London need to be included?) Should local judges in London and Ottawa be included? Should the record be required where the motion is without notice?

- Courts Administration suggested re records on applications that they be called "application books" so as to avoid confusion with trial records. The precedent they sight is "Appeal Books". Working Group. We see some sense in avoiding confusion with trial records, but it should not be called a "book" unless required to be bound back and front like an appeal

(2) Where the moving party fails to deposit the motion record as required by subrule (1), the registrar shall remove the motion from the hearing list.

MOTION IN WRONG FORUM

37.09 A motion improperly brought before a court, judge or officer may be adjourned or transferred to the proper court, judge or officer.

book. We feel this would be unnecessary expense and prefer the terms "motion record" and "application record".

- the rule does not require a factum to be filed on motions.
- 37.08(2) is really a warning to the profession of what is in fact the practice today in Toronto Motions Court.

37.09

- Williston 37.08, L.R. to take account of J. Morden's comment. Heading changed.

37.08 Where Motion Brought before Wrong Court, Judge or Officer
A motion improperly brought before any court, judge or officer may be adjourned to the proper court, judge or officer.

HEARING OTHER THAN IN OPEN COURT

37.10 (1). A motion may be heard in the absence of the public where,

- (a) the order sought is unopposed or on consent;
- (b) because of urgency, it is impractical to have the motion heard in public;
- (c) the motion is to be heard by conference telephone under rule 37.10;
- (d) the motion is brought in the course of a pretrial conference.

37.10

- Williston 37.09, L.R., substantial changes and new heading.
- J. Morden noted that the statutory provision ("open court") and the rule ("absence of the public") use different language. Working Group. Judicature Act will be amended to refer to "in the absence of the public".
- Williston 37.09(c) re estates of parties under disability has been deleted. Where appropriate cases concerning parties under disability can be heard in private pursuant to an order under 37.10(2).
- 37.10(1)(c) is simply a transfer from Williston 27.10 and says the same thing more specifically.
- 37.10(1)(d) is new.

37.09 Where Public may be Excluded

- (1) A motion may be heard in the absence of the public where,
 - (a) the order sought is unopposed or on consent;
 - (b) because of urgency, it is impractical to have the motion heard in public; or
 - (c) the proceeding relates to the estate or property of a party under disability.

(2) The hearing of all other motions shall be open to the public unless, on any particular motion, the presiding judge or officer is satisfied that the possibility of serious prejudice or injustice to the parties or any of them justifies a departure from the general principle that hearings should be held in public and endorses on the notice of motion his leave for a hearing in the absence of the public.

- 37.10(2) has been redrafted to better express the relevant test. Judicature Act s.73 should be similarly redrafted.

- Williston Sub-rule (3) has been deleted. Working Group. This has been done in light of G. Watson's comment and the subject should be dealt with, along the lines he suggested, in the Judicature Act.

HEARING BY WAY OF CONFERENCE TELEPHONE

37.11 (1) [^]Where all counsel on a contested motion and the judge or officer before whom the motion is returnable consent, the motion may be heard on a conference telephone call.

(2) Where ^{*}contested motion is to be heard in this manner, counsel for the party bringing the motion shall file with the court and serve on every other party a record containing a copy of all documents relevant to the motion.

37.11

- Williston 37.10, L.R.

(2) The hearing of all other motions shall be open to the public unless, in any particular motion, the presiding judge or officer is satisfied that the possibility of serious prejudice or injustice to the parties or any of them outweighs the desirability of holding the hearing in public and endorses upon the Notice of Motion his leave for a hearing in the absence of the public.

(3) Where a motion is heard in the absence of the public, there shall be no publication of any matter connected with the motion or given in evidence at the hearing except by leave of the presiding judge or officer.

37.10 Hearing by Way of Conference Telephone

(1) Notwithstanding the provisions of Rule 37.09, where all counsel on a contested motion and the judge or officer before whom the motion is returnable consent, the motion may be heard on a conference telephone call.

(2) Where a contested motion is to be heard in this manner, counsel for the party bringing the motion shall file with the court and furnish to every other counsel a record containing a copy of all documents relevant to the motion.

DISPOSITION OF MOTION

37.12 On the hearing of a motion, the presiding judge or officer may allow, dismiss or adjourn the motion either in whole or in part and with or without terms or, where the motion is heard by a judge or a local judge, he may direct,

- (a) in a proper case, that the motion be converted into a motion for judgment;
- (b) the trial of an issue with such directions or upon such terms as are just and may adjourn the motion to be disposed of by the trial judge; or
- (c) where the proceeding is an action, that it be placed forthwith, or within a specified time on a list of cases requiring speedy trial or, where the proceeding is an application, that it be heard at such time and place and on such terms as are just.

37.12

- Williston 37.11, L.R.

- Working Group. Should the powers specified in (b) and (c), or at least in (c), be also given to masters? ((c) is given to masters re summary judgment).

37.11 Disposition of Motion

On the hearing of a motion, the presiding judge or officer may allow, dismiss or adjourn the motion either in whole or in part and with or without terms; or, where the motion is heard by a judge, or a local judge, he may direct,

- (a) in a proper case, that the motion be converted into a motion for judgment;
- (b) the trial of an issue with such directions or upon such terms as may seem just; or
- (c) where the proceeding is an action, that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial or, where the proceeding is an application, that it be heard at such time and place and upon such terms as may seem just.

MOTIONS IN A COMPLICATED ACTION OR SERIES OF ACTIONS

37.13 Where a proceeding involves complicated issues or where there are two or more related proceedings involving similar issues, the Chief Justice of the High Court or the Chief Judge of the County and District Courts, as the case may be, or a judge designated by him may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 does not apply to such motions.

37.13

- Williston 37.12, L.R. and substantive changes.
- Working Group. We recommend the rule apply to applications as well as to actions and to county courts as well as the Supreme Court (eg. many of the Mississauga derailment cases are in county courts). [This may be an appropriate time to discuss the need for giving some court (eg. the High Court) power to control all related litigation in all courts - though the relevant provision would not go here, and would probably go in the Judicature Act].
- It seems necessary to exempt these motions from the operation of 37.03.
- Does this rule need specific authorization? Add a new head, circa s.40(2)(i)?

37.12 Motions in a Complicated Action or Series of Actions

Where an action in the Supreme Court involves complicated issues or where there are two or more actions in the Supreme Court arising out of the same transaction, occurrence, or series of transactions or occurrences, involving similar issues, the Chief Justice of the High Court may direct that all motions in any such action or actions be heard by a particular judge designated by him.

PROHIBITING MOTIONS WITHOUT LEAVE

37.14 Where the presiding judge or officer, on the hearing of a motion, is satisfied that a party is attempting to delay or add to the costs of a proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions, he may prohibit the party from bringing any further motions in the proceeding without leave.

37.15 Where a case of extreme urgency exists, a motion may be made before the commencement of a proceeding upon the undertaking of the moving party to commence the proceeding forthwith.

37.15

- Williston 37.05(2)(b), L.R.

FORM 37A

- In response to J. Morden's comments
(a) it will be redrafted to align the wording with 37.04, and (b) it will require that the moving party state whether it is to be heard by a judge, local judge, etc.

37.13 Prohibiting Motions Without Leave

Where the presiding judge or officer, on the hearing of any motion, is satisfied that any party is attempting to delay a proceeding or add to the costs thereof, or otherwise abuse the process of the court by multiplicity of frivolous or vexatious motions, he may prohibit any such party from bringing any further motions in the proceeding without leave.

(b) Where a case of extreme urgency exists, a motion may be made before the commencement of a proceeding upon the undertaking of the applicant to commence the proceeding forthwith.

RULE 38 JURISDICTION AND PROCEDURE
ON APPLICATIONS

APPLICATION OF RULE

38.01 Rule 38 applies to all proceedings commenced by a notice of application (Form 16D) under rule 16.04.

JURISDICTION TO HEAR AN APPLICATION

In General

38.02 (1) Unless otherwise provided by [^]statute, a judge of the court in which an application is commenced has [^]jurisdiction to hear the application and, where an application in the Supreme Court is to be heard outside the Judicial District of York, the application may be heard by a local judge, if within his jurisdiction as defined by this rule.

Local Judge

(2) A local judge outside the Judicial District of York has jurisdiction to hear any application in the Supreme Court commenced in his county, except an application for judicial review.

RULE 38 JURISDICTION AND PROCEDURE
ON APPLICATIONS

38.01

- L.R.

38.02(1)

- L.R.

38.02(2) - (4)

- Williston 38.02(2), sub-ruled and L.R.

- 38.02(2) In response to J. Morden's and G. Watson's comments the exception for applications "required to be made to a Supreme Court judge" has been deleted.

RULE 38 JURISDICTION AND PROCEDURE
ON APPLICATIONS

38.01 Application of Rule

This rule shall apply to all proceedings commenced by a Notice of Application pursuant to Rule 16.04.

38.02 Jurisdiction to Hear an Application

(1) In General

Unless otherwise provided by any statute, a judge of the court in which an application is commenced has the jurisdiction to hear the application and, where an application in the Supreme Court is made returnable outside the Judicial District of York, the application may be heard by a local judge, if within his jurisdiction as defined by this rule.

(2) Jurisdiction of Local Judge

Except where an application is for judicial review or is required by any statute to be made to a judge of the Supreme Court, a local judge, outside the Judicial District of York, has jurisdiction to hear any application in the Supreme Court commenced in his county; subject to the right of any respondent to the application, within 5 days of the service upon him of the Notice of Application, to obtain from the registrar and serve upon the applicant an Order of Transfer (Form 38A) transferring the application to a judge of the Supreme Court. Where the applicant is served with an Order of Transfer as herein provided, he may only proceed with the application by serving and filing a notice making the application returnable before a judge of the Supreme Court at a place and date for hearing to be obtained as provided in Rule 38.03.

Order of Transfer

(3) Where an application is brought before a local judge, the respondent may, within five days after service on him of the notice of application, obtain on requisition from the registrar and serve on the applicant an order of transfer (Form 38A) transferring the application to a judge of the Supreme Court.

(4) Where the applicant is served with an order of transfer, he may proceed with the application only by delivering a notice of transfer (Form 38B) bringing the application before the judge of the Supreme Court at a place named in the notice on a hearing date to be obtained as provided in rule 38.03.

PLACE AND DATE OF HEARING IN THE SUPREME COURT

38.03 (1) An application to a local judge shall be heard in the county in which the application is commenced.

(2) An application to a judge of the Supreme Court may be heard in any county.

(3) In an application in the Supreme Court, a hearing date shall be obtained from the registrar in the county where the application is to be heard.

38.03(1) and (2)

- Williston 38.03(1) sub-ruled and L.R.

38.03(3)

- Williston 38.03(2) and (3) reduced to one sub-rule. Working Group. The revised rule adopts the approach that in Supreme Court applications the date for a hearing will always be obtained from the local registrar. (In some cases Williston required applicant to go through one registrar to another). This rule reduces the work load of court offices and allows applicant's solicitor to speak directly with the relevant court officer.

38.03 Place and Date of Hearing in the Supreme Court

(1) An application to a local judge shall be made returnable in the county in which the application is commenced. An application to a judge of the Supreme Court may be made returnable in any county.

(2) Where an application in the Supreme Court is made returnable in the county in which it is commenced, a date for hearing shall be obtained from the registrar in that county.

(3) Where an application in the Supreme Court is made returnable in a county other than the county in which it is commenced, or where an Order of Transfer has been served upon the applicant, as provided in Rule 38.02, a place and date for the hearing before a judge of the Supreme Court shall be obtained through the registrar in the county where the application was commenced.

(4) [^]Where the application is urgent and a satisfactory date cannot be obtained from the registrar, the application may be brought on for hearing on any date that a local judge or a judge of the Supreme Court, as the case may be, is sitting for the hearing of applications in the county where the applicant proposes the application be heard.

ISSUING OF NOTICE

38.04 A notice of application shall be issued as provided by rule 16.06 before it is served.

CONTENT OF NOTICE

38.05 A notice of application (Form 16D) shall state the relief sought and shall specify with particularity the nature of any claim made or any question sought to be determined, as well as the grounds [^]to be argued, including reference to any statutory provision or rule [^]to be invoked.

38.04

- L.R.

38.05

- L.R., Form number added.

(4) Notwithstanding paragraphs (2) and (3), where the application is urgent and a satisfactory date cannot be obtained from the registrar, the application may be made returnable on any date that a local judge or a judge of the Supreme Court, as the case may be, is sitting for the hearing of applications in the county where the applicant proposes the application be heard.

38.04 Issuing of Notice

Every Notice of Application shall be issued as provided by Rule 16.06 before it is served.

38.05 Content of Notice

Every Notice of Application shall state the relief sought and shall specify with particularity the nature of any claim made or any question sought to be determined, as well as the grounds intended to be argued, including reference to any statutory provision or rule sought to be invoked.

SERVICE OF NOTICE

Generally

38.06 (1) The notice of application shall be served on all parties and, where there is doubt as to who else should be served, the applicant may bring a motion before a judge, without notice, for an order for directions.

>

Where Notice Ought to Have Been Served

(2) Where it appears to the judge that the notice of application ought to have been served on a person who has not been served, the judge may,

(a) adjourn the motion and direct that the notice of motion be served; or

(b) direct that any order made on the motion be served,

in such manner as is just.

Time for Service

(3) A notice of application shall be served within the time prescribed by rule 16.07.

38.06

- L.R., heading changed, substantive changes.
- As J. Morden pointed out the Williston Committee's 38.06 wrongly followed the analogy of motions, ignoring the fact that a notice of application is an originating process requiring personal service, etc. and with the substitutional service rules applying. This requires redrafting.
- 38.06(1) is O.K. and L.R.
- Williston 38.06(2) is inappropriate and has been deleted. Where there is no respondent (e.g. change of name) there is no party to be served under 38.06(1) and no service is necessary. Where service is impractical the substitutional service rules apply (and the court can now dispense with service if it is in the interests of justice). Where the situation is one of urgency the applicant should apply by motion for interim relief on the application, and that motion can be brought without notice.
- 38.06(2) is Williston 38.06(3) with the alternative of "serving the order made" deleted.

38.06(3)

- Caps removed.

38.06 Service of Notice

(1) *Where Required*

The Notice of Application shall be served on all parties to the proceeding and, where there is doubt as to who should be served, the applicant may apply to a judge, without notice, for an order for directions.

(2) *Where Not Required*

Where the nature of the application or the circumstances of the case render service of the Notice of Application impractical or unnecessary, or where the delay necessary to effect such service might entail serious consequences, the judge may make an order without notice.

(3) *Where Notice Ought to be Served*

When it appears to the judge that the Notice of Application ought to be served on a person who has not been served, and who may be affected by the order sought, the judge may direct that the Notice of Application or any order made on the application be served on the person in such manner as may seem just.

(4) *Time for Service*

A Notice of Application shall be served within the time prescribed by Rule 16.07.

NOTICE OF APPEARANCE

38.07 (1) A respondent who has been served with a notice of application shall deliver a notice of appearance (Form 38B) forthwith and no later than three days before the hearing date of the application.

(2) A respondent who has not delivered a notice of appearance is not entitled to file material or to examine or cross-examine witnesses on the application.

38.07

- new in response to comments by G. Watson and Judge Zalev. We suggest the term should be "notice of appearance". "Notice of Intention to Defend" is best avoided because in an action this will "buy the defendant extra time" to respond, but not so here. The present appearance can be filed as late as the day of the hearing which reduces its utility in terms of telling the applicant who is representing the respondent. The revised rule requires it to be delivered forthwith and not later than 3 days before the hearing date. Until delivered a respondent may not file material, or examine or cross-examine witnesses. No other consequences (e.g. no proceedings in default) are provided for.

RECORD

38.08 (1) Where an application (on notice) is brought before a judge [or local judge] of the Supreme Court], the applicant shall, not later than the day before the hearing, serve on every other party and deposit with the registrar a record for the use of the court consisting of,

- (a) an index;
- (b) a copy of the notice of application;
- (c) a list of all relevant transcripts of evidence in chronological order, but not the transcripts themselves;
- (d) a copy of all affidavits and other material filed for use on the hearing of the application; and
- (e) a factum consisting of a concise statement, without argument, of the facts and law relied on by the applicant.

(2) In an application referred to under subrule (1), the respondent shall, not later than the day before the hearing, serve on every other party and deposit with the registrar for the use of the court,

- (a) a copy of any new material filed by the respondent for use on the application; and
- (b) a factum consisting of a concise statement, without argument, of the facts and law relied on by the respondent.

(3) Where the applicant fails to deposit the record as required by subrule (1), the registrar shall remove the application from the hearing list.

(4) A judge may dispense with compliance with this rule in whole or in part.]

38.08

- Williston 38.07, L.R. and substantive changes.
- Should the record be required where the application is without notice? Before local judges as well as Supreme Court judges?
- Revised rule requires service and depositing not later than day before the hearing. Courts Administration suggest 2 days before. Which is best?
- Courts Administration point out that if the record can be deposited by mail, 4.08(4) should be amended by adding the word "deposited". This has been done. (Should the term "deposit" be defined in Rule 1 ?
- Williston 38.07 did not require a factum: revised rule does (cf. present R.238).
- Williston 38.07 did not require the responding party to deposit new material for use on the application: revised rule does (cf. present R.238).
- With regard to records on applications for judicial review, the procedure on such applications is to be put in Rule 63 (see 38.12 below)

38.07 Record

Where an application on notice is made returnable before a judge of the Supreme Court, the applicant shall, on or before the day prior to the hearing of the application, deposit with the registrar a record for the use of the court consisting of,

- (a) an index;
- (b) a copy of the Notice of Application; and
- (c) a copy of all affidavits or other material filed for use on the hearing of the application.

>

Williston 38.08

deleted. Working Group. This rule followed the inappropriate analogy of motions. What is necessary in this Rule is a provision for setting aside judgments on applications, similar to the rules for setting aside default judgments, summary judgments, and a judgment at trial where the defendant does not appear. See now 38.11 below.

38.09

L.R. new heading

J. Morden asked what is the authority for this curative provision. Working Group. It does need statutory authorization. Hence there will be added to the Judicature Act either (a) a general provision for transfer between all courts (and this rule deleted) or (b) a specific rule making authorization for this rule (in which case it would be retained).

APPLICATION IN WRONG FORUM

38.09 (1) An application improperly brought before a court, judge or officer may be adjourned or transferred to the proper court, judge or officer.

(2) Where an application is transferred to another court, the proceeding shall be continued as if it had been commenced in that court.

38.08 Rescinding Orders Made Without Notice

(1) Any person affected by an order made without notice to him, or any person who has failed to appear on an application through accident, mistake or insufficient notice, may apply to rescind or vary the order by Notice of Motion served within 10 days and returnable within 15 days after the order came to his attention.

(2) The motion may be made to the judge who made the order or to any other judge having jurisdiction.

38.09 Where Application Brought in Wrong Court

(1) Any application improperly brought before any court, judge or officer may be transferred or adjourned to the proper court, judge or officer.

(2) Where any application is transferred to another court, the proceeding shall thereafter be styled in the court to which it is transferred and shall be proceeded with as if it had been commenced in that court.

Williston 38.10

- This provision with regard to hearings other than in open court has been deleted. The analogy here is to trials not to motions and therefore applications should be added to s.73 (1) of the Judicature Act, and the reference to "applications" in subsection (2) deleted.

38.10

- Williston 38.11, L.R.

DISPOSITION OF APPLICATION

38.10 (1) On the hearing of an application, the presiding judge may,

- (a) allow, dismiss or adjourn the application, either in whole or in part and with or without terms; or
- (b) where he is satisfied that there is a substantial dispute of fact, direct that the whole application proceed to trial or direct the trial of any particular issue or issues and, in either case, give such directions and impose such terms as are just.

(2) Subject only to the directions and terms contained in the order directing a trial, the proceeding shall thereafter be treated as an action.

38.10 Where Public may be Excluded

The provisions of Rule 37.09 shall apply, with any necessary modification, to any proceeding commenced by a Notice of Application.

38.11 Disposition of Application

(1) On the hearing of an application, the presiding judge may,

- (a) allow, dismiss or adjourn the application, either in whole or in part and with or without terms; or
- (b) where he is satisfied that there is substantial dispute of fact, direct that the whole application proceed to trial or direct the trial of any particular issue or issues and, in either case, give such directions and impose such terms as may seem just.

(2) Subject only to the directions and terms contained in the order directing the trial, the proceeding shall thereafter be treated as an action.

SETTING ASIDE JUDGMENT ON APPLICATION

Rescinding Orders Made Without Notice

38.11 (1) A person who is affected by a judgment on an application made without notice to him or who failed to appear at the hearing of an application may move to set aside or vary the judgment by notice of motion served forthwith after the judgment came to his attention and naming the first available hearing date.

(2) On a motion under subrule (1), a judge may set aside or vary the judgment on such terms as are just.

(APPLICATION TO DIVISIONAL COURT

38.12 Except as otherwise provided in these rules, Rule 38 applies, with necessary modifications, to an application to the Divisional Court.)

38.11

- New, in lieu of Williston 38.08 (see above).

38.12

- L.R.
- This rule has been temporarily redrafted as it appears in the revised rules. In light of T. Bridges extensive comments we feel the Rule 69 Proceedings for Judicial Review should be extended to deal comprehensively with the procedure on such motions, or it should accept the basic Rule 38 procedure and modify and build on it.

38.12 Application to Divisional Court

The provisions of this rule shall apply, with any necessary modification, to an application to the Divisional Court.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

BY AFFIDAVIT

Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless otherwise provided.

Service and Filing

(2) Where a motion or application is made on notice, any affidavit in support of the motion or application shall be served with the notice of motion or notice of application.

(3) All affidavits to be used on the hearing shall be served and filed with proof of service, not later than 4 p.m. on the day preceding the hearing.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS39.01

- L.R., headings added.

39.01(2) and (3)

- Williston 39.01(2), sub-ruled.

Williston 39.01(3)

- Deleted. Working Group. We see no reason why, as a general rule, a party should be entitled to file affidavits for use on motions without notice as late as on the hearing. To permit judges and masters to prepare for the hearing they should be filed no later than 4:00 p.m. on the preceding day. Where urgency or convenience supports filing on the hearing this can be permitted by abridging time under Rule 3.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

39.01 By Affidavit

(1) Evidence upon a motion or application may be given by affidavit unless otherwise provided.

(2) Where a motion or application is made on notice, any affidavit in support of the motion or application shall be served with the Notice of Motion or Notice of Application, as the case may be. All affidavits to be used upon the hearing shall be served and filed with proof of service, not later than 4 p.m. on the day preceding the hearing.

(3) Where a motion or application is made without notice, it shall be sufficient to file any affidavit in support of the motion or application on or before the hearing thereof.

Contents

(4) [^] An affidavit for use on a motion (need not be confined to statements of fact within the knowledge of the deponent, but) may contain statements as to his information and belief, if the source of his information and the fact of his belief [^] are specified in the affidavit.

(5) An affidavit for use on an application (shall be confined to facts within the personal knowledge of the deponent except that the affidavit) may contain statements as to the information and belief of the deponent with respect to facts that are not contentious, if the source of his information and the fact of his belief [^] are specified in the affidavit.

39.01(4) and (5)

L.R.

Working Group. We propose that the general rule as to the contents of affidavits, Rule 4.07(2), be redrafted to read as follows:

Contents

(2) Every affidavit shall be confined to the statements of facts within the personal knowledge of the deponent or to other evidence which the deponent could give if testifying as a witness in court, except as otherwise provided in these rules.

The reason for the change? Why should competent testimony be more

(4) Except in the case of a motion for summary judgment under Rule 22, an affidavit for use upon a motion need not be confined to statements of fact within the knowledge of the deponent, but may contain statements as to his information and belief, provided the source of his information and his belief therein are specified in the affidavit.

(5) An affidavit for use upon an application shall be confined to facts within the personal knowledge of the deponent; provided, however, that the affidavit may contain statements as to the information and belief of the deponent with respect to facts which are not contentious, where the source of his information and his belief therein are specified in the affidavit.

limited on an affidavit than at trial?

(The extension would permit eg. admissible hearsay and competent opinion evidence).

With 4.07(2) redrafted in the above manner the reference to "personal knowledge, etc." would be deleted from 39.01(4) and (5) (because the general rule would be too lengthy to state here) and then only the extension made here as to the contents of the affidavits stated.

39.01(6)

- new. Working Group. We feel that this is a useful addition as to the contents of affidavits, which states the existing practice.

(6) Where a motion or application is made without notice, the affidavit material shall make full and fair disclosure of all material facts.

BY EXAMINATION OF A WITNESS

Before the Hearing

39.02 (1) A person may be examined as a witness ^A before the hearing of a motion or application for the purpose of having a transcript of his evidence available for use on the hearing. ^A

(2) A witness examined under subrule (1) may be cross-examined by the examining party and re-examined by any other party.

39.02(1)

- L.R.
- Reference to "who is not a party" has been deleted. Working Group. The Williston Rule would have foreclosed the examination of any party as a witness on a pending motion. We feel this goes too far. The caselaw has developed limits on when a party may be so examined, but in some cases it will be appropriate.

39.02(2)

- new. Working Group. The rules follow a general pattern of indicating the type of examination envisaged or permitted with regard to the various types of out of court examination. See, Re examination for discovery (cross-examination permitted; 32.06(2); re-examination

39.02 By Examination of a Witness
(1) *Prior to the Hearing*

A person who is not a party to the proceeding may be examined prior to the hearing of a motion or application for the purpose of having a transcript of his evidence available for use upon the hearing thereof.

permitted; 33.12) and Re Commission evidence, 53.02 (examination as at trial) and pre-trial examination of experts, 52.02 (examination as at trial). We believe it would be useful to spell out here the type of examination permitted of a witness on a motion or application. The revised rule provides that the examining party may cross-examine the witness. This is because typically a party will only resort to examining a witness (as opposed to filing his affidavit) where the witness declines to make an affidavit i.e. such witnesses will usually not be friendly to, or co-operating with, the examining party. There seems little danger of (or evil in) the examining party deciding to examine (and therefore cross-examine) a friendly witness on a motion. In a

affidavit the deponent's testimony is put forward in a manner so as to favour the party filing it (i.e. he is "lead" on his affidavit). Usually a party will get more or as much advantage from the witness's affidavit as from leading him through an oral cross-examination.

What should be the nature of the examination to be conducted by parties other than the examining party? We feel that, ideally, the type of examination should vary, depending upon the relationship and posture of the witness to the other party, and the rule could say "and every other party may re-examine or cross-examine as is appropriate". If there should be just one standard in the rule we lean in favour of permitting cross-examination, because in some cases the other party may need to cross-examine if a witness is unfriendly.

On the Hearing

(3) A person may be examined or cross-examined on the hearing of a motion or application, but only with leave of the court.

CROSS-EXAMINATION ON AFFIDAVIT

On a Motion or Application

39.03 (1) A party to a motion ^{or application} who has delivered every affidavit on which he intends to rely may cross-examine the deponent of any affidavit delivered by the opposite party.

(2) Where a party has cross-examined under subrule (1), he shall not deliver any additional affidavit for use on the hearing without leave or consent, and leave may be granted where the court is satisfied that he ought to be permitted to respond by affidavit to any matter raised on the cross-examination.

If he is obviously friendly to the other party who has cross-examined him by leading questions then on the hearing the judge or officer would probably give reduced weight to any testimony so adduced.

39.02 (3)

- L.R.

39.03

- This rule has been substantially reorganized.
- Working Group. The Williston rules closely regulated cross-examination re motions (39.03(1)) but left cross-examination re applications largely unregulated (39.03(2)). The reason for this was that the cross-examina-

(2) *On the Hearing*

A person may be orally examined or cross-examined on the hearing of a motion or application, but only with leave of the presiding judge or officer.

39.03 Cross-examination on Affidavit

(1) *Made for Use upon a Motion*

- (a) Any party to a motion who has delivered every affidavit upon which he intends to rely, may cross-examine the deponent of any affidavit delivered by or on behalf of the opposite party.
- (b) Where a party has cross-examined under clause (a), he shall not deliver any additional affidavit for use on the hearing of the motion without leave or consent; and such leave may be granted where the court is satisfied that he ought to be permitted to respond by affidavit to any matter raised on the cross-examination.

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To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence.

Additional Provisions Applicable to Motions

(4) On a motion other than a motion for summary judgment, a party who cross-examines the opposite party,

- (a) is liable for the party and party costs of the opposite party in respect of the cross-examination in any event of the cause, unless otherwise ordered; and
- (b) where he orders a transcript of the examination, shall serve a copy on the opposite party, free of charge.

tion on applications is part of the evidence upon which the court will finally decide the whole lis. But even given this reasoning (which we agree with generally) we feel that Williston 39.03(1) (a) and (b) (requiring the party to file his own affidavit material before cross-examining, etc.) should apply equally to applications as to motions. The purpose of these provisions is to prevent a party cross-examining first and then filing his affidavits, thus leading (usually) to a further round of cross-examinations. We see no injustice if parties on applications have to follow this general principle. The Williston Rules provided re cross-examinations on summary judgment motions that (in effect) the rules relating to cross-examinations on motions applied except the automatic cost provision and the free transcript

(c) Any party who cross-examines the deponent of any affidavit delivered by or on behalf of the opposite party for use upon a motion, shall be liable for the party and party costs of the opposite party in respect of such cross-examination in any event of the cause, unless otherwise ordered by the court.

(d) Where the party who cross-examines orders a transcript of such cross-examination, he shall serve a copy thereof on the opposite party, free of charge.

(e) Cross-examination on an affidavit delivered for use upon a motion for summary judgment is governed by Rule 22.03.

(2) *Made for Use upon an Application*

Where a person has made an affidavit for use upon an application, he may be cross-examined thereon, unless otherwise ordered.

(3) *To be Exercised with Reasonable Diligence*

The right to cross-examine under paragraphs (1) and (2) shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to do so.

provision. These provisions are excepted from summary judgment motions for the same reason as they do not apply to cross-examinations in respect of applications - on a motion for summary judgment the court may finally determine the whole proceeding.

What we propose is that cross-examinations on motions generally be regulated as provided by Williston. With respect to the regulation of cross-examinations on affidavits and on motions for summary judgment, we recommend a common approach i.e. the cross-examining party must first file his own affidavits but there should be no automatic cost rule or free transcript rule.

Revised Rule 39.03 gives effect of these recommendations.

PRESERVATION OF RIGHTS
PENDING LITIGATIONRULE 40 INTERLOCUTORY INJUNCTION OR
MANDATORY ORDER

ON MOTION TO A JUDGE

40.01 A party to a pending or intended proceeding may make a motion to a judge for an interlocutory injunction or mandatory order or for an extension thereof.

RULE 40 INTERLOCUTORY INJUNCTION OR
MANDATORY ORDER40.01

- L.R. particularly to remove the implication that the motion could literally only be made to a judge of the court in which the proceeding is pending (i.e. that in a Supreme Court proceeding it must be made to a High Court judge and could not be made to a local judge. Under Rule 38 (see revised rule 37.02(5)) a local judge may hear a motion for an interlocutory injunction. Judge Kurisko, in his comment, had interpreted Williston 40.01 as excluding the local judge's jurisdiction. His interpretation was understandable but was not, we believe, what the Williston Committee intended.

PRESERVATION OF RIGHTS

PENDING LITIGATION

RULE 40 INTERLOCUTORY INJUNCTION OR
MANDATORY ORDER

40.01 On Motion to a Judge

A motion for an interlocutory injunction or mandatory order, or for an extension thereof, shall be made to a judge of the court in which the proceeding is pending, or in which the intended proceeding is to be brought.

WHERE MOTION MADE WITHOUT NOTICE

40.02 (1) An injunction granted on a motion that is made without notice shall be for a period not exceeding ten days.

(2) Where an injunction is granted on a motion made without notice, a motion to extend the injunction may be made only on notice to each party affected by the order unless it can be shown that because a party has been evading service or because of some other exceptional circumstances, the injunction ought to be extended without notice to the party and any extension granted shall not exceed a further ten days.

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless otherwise ordered, undertake to abide by any order as to damages that the court may make if it ultimately appears that the granting of the order has caused a loss to the responding party that the moving party ought to pay.

40.02

- L.R.

40.03

- L.R. Note that "by his counsel" has been deleted. We could not see the reason for this phrase.

40.02 Where Motion Made Without Notice

(1) Where the motion is made without notice, an injunction may only be granted for a period not exceeding 10 days.

(2) Where an injunction is granted on a motion made without notice, a motion to extend the injunction may only be made on notice to any party affected by the order unless it can be shown that any such party has been evading service or that, by reason of some other exceptional circumstances, the injunction ought to be extended, in which case the extension shall be confined to a period not exceeding a further 10 days.

40.03 Undertaking

On a motion for an interlocutory injunction or mandatory order, the plaintiff or applicant, by his counsel, shall, unless otherwise ordered, undertake to abide by any order as to damages which the court may make should it ultimately appear that the defendant or respondent has sustained any loss by reason of the granting of the order which the plaintiff or applicant ought to pay.

RULE 41 APPOINTMENT OF RECEIVER

RULE 41 APPOINTMENT OF RECEIVER

RULE 41 APPOINTMENT OF RECEIVER

Working Group. We met and discussed this rule with Ron Robertson, Q.C. and Herbert Mayer, Q.C. They were basically happy with the Williston Committee's approach to Receivers and they suggested three further additions.

1. Permitting a privately appointed receiver to apply to the court for directions. (This will be achieved through the addition of a provision in the Judicature Act).
2. Permitting an application by other creditors or the debtor to the court to submit a privately appointed receiver to the supervision of the court. We tentatively agreed to impliment this suggestion by a new section in the Judicature Act modelled after the provisions of part 9 of The Bankruptcy Bill 1980. At a subsequent meeting they withdrew this idea on the ground that part 9 of The Bankruptcy Bill will apply not only to bankruptcy but whenever a debtor becomes insolvent. The Bill will be law by this summer and it is better not to have two acts providing for court supervision of private receivers. The Working Group

DEFINITION

41.01 In Rule 41, "receiver" means a receiver or receiver and manager.

ON MOTION TO A JUDGE

41.02 A party to a pending or intended proceeding may make a motion to a judge for the appointment of a receiver under section 45 of the Judicature Act.

41.03 The order appointing a receiver shall,

- (a) name the person appointed or refer the appointment to a master;
- (b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of his duties or refer the determination thereof to a master;
- (c) state whether the receiver is also appointed as manager and, if necessary, define the scope of his managerial powers; and
- (d) contain such directions and impose such terms and conditions as are appropriate.

agrees that there is, therefore, no need for a provision in the Judicature Act.

3. Giving a judge specific power to refer the conduct of a receivership to a master with power in the master to refer any question back to a judge (see below 41.04).

41.01

- new

41.02

- Williston 41.01, L.R.

41.03

- Williston 41.02, L.R.

41.01 On Motion to a Judge

A motion for the appointment of a receiver, or receiver and manager, shall be made to a judge of the court in which the proceeding is pending, or in which the intended proceeding is to be brought.

41.02 Form of Order

The order appointing a receiver, or receiver and manager shall,

- (a) name the person so appointed or refer the appointment thereof to a master;
- (b) specify the amount and terms of the security, if any, to be furnished by him for the proper performance of his duties or refer the determination thereof to a master;
- (c) state whether the person appointed as receiver is also appointed as manager and, if necessary, define the scope of his managerial powers; and
- (d) contain such directions and impose such terms and conditions as may seem appropriate.

REFERENCE TO MASTER

41.04 (1) The order appointing a receiver may refer the conduct of all or part of the receivership to a master.

(2) Where an order of reference is made, the master may submit any question arising in the receivership for determination by a judge.

(3) A report or interim report on a reference under subrule (1) may be confirmed on motion to a judge or by the procedures set out in rule 56.06.

41.04

new in response to Robertson-Mayer's suggestion. We believe the power to direct this reference should be contained in the receiver rule. We also feel that the provision giving power to the master to submit any question to a judge is a useful one.

So far as confirmation of the master's report, and any interim reports, Messrs. Robertson and Mayer said they would like to see a scheme under which (a) the report could be confirmed by the passage of time (similar to 56.06(2)) but (b) with the right of any party to immediately move before a judge for confirmation or setting aside of any report or interim report (e.g. the sale of an asset or the whole business, where time is usually of the essence). The confirmation procedure they propose may be difficult to work in with the general rules re confirmation (56.06). What we have done here is to set out the scheme requested by them and when we get to the reference rule (Rule 56) we will attempt to align the confirmation power they requested with 56.06.

DIRECTIONS

41.05 (1) A receiver may seek directions from the court at any time.

(2) A receiver who acts under the powers contained in an instrument may obtain directions on an application.

(3) A receiver who has been appointed by the court may obtain directions on motion to a judge, unless there has been a reference to a master, in which case the motion may be made to the master.

DISCHARGE

41.06 A receiver [^]may be discharged only [^]by the order of a judge.

41.05

- Williston 41.03, L.R. and substantive changes to provide the procedure for applying for directions, including an application by a privately appointed receiver.

41.06

- Williston 41.04, L.R.

41.03 Directions

A receiver, or receiver and manager, may apply to a judge for directions at any time and from time to time.

41.04 Discharge

A receiver, or receiver and manager, may only be discharged by the order of a judge.

RULE 42 CERTIFICATE OF PENDING LITIGATION

LEAVE TO ISSUE REQUIRED

42.01 A certificate of pending litigation under section 50 of the Judicature Act may be issued by a registrar only pursuant to an order of the court.

WHERE MOTION MAY BE MADE WITHOUT NOTICE

[42.02 (1) Where a claim for a certificate of pending litigation, together with a description of the lands in question, sufficient for registration of the certificate has been included in the originating process, a motion for leave to issue a certificate of pending litigation may be made to the court without notice.]

RULE 42 CERTIFICATE OF PENDING LITIGATION42.01

L.R.

Working Group. Since the governing law and some of the relevant procedure is in s.50 of the Judicature Act, we have inserted here what is, in effect, a "reminding" cross reference to the section.

42.02 (1)

Williston 42.02, L.R.

Working Group. We have difficulty understanding why the motion under 42.02(1) may be made without notice (in every case) if the claim for the certificate and the description of the land are included in the originating process, whereas it must be on notice (42.03) if no claim is made in the originating process. While this is the practice today (R.11(a), R.32 (2)) is it necessary or proper? There is no other relief in respect of which the right to proceed ex parte is given just because a claim for the relief is made in the originating process. Contrast, for example, interim injunctions. (Note that 42.02 does not even require that the originating process have been served). Despite

RULE 42 CERTIFICATE OF PENDING LITIGATION

42.01 Leave to Issue Required

A certificate of pending litigation may only be issued by a registrar pursuant to an order of the court.

42.02 Where Motion may be Made Without Notice

Where a claim for a certificate of pending litigation together with a description, sufficient for registration, of the lands in question, has been included in the originating process, a motion for leave to issue a certificate of pending litigation may be made without notice.

the above objections, can the procedure be justified on the grounds of expediency and effectiveness, i.e. the plaintiff gets his order and certificate and the defendant can then move to set aside the order? But this right, to move against ex parte orders, applies to other forms of interim relief, which may only be obtained ex parte where good reason is shown for proceeding ex parte.

Unless we have overlooked something we feel 42.02(1) should be qualified by language similar to the following-"and where there is reason to believe that if the order is not made without notice the plaintiff's rights may be defeated".

42.02(2)

New. Working Group. We believe the rule should require that if the order is obtained without notice, the order must be served forthwith. This is particularly important in this context because it is an order which is effective without being served on the defendant. [This provision could be deleted if our recommendation for changing Rule 37.05 to provide that, generally, orders obtained without notice must be served forthwith, is accepted.]

42.03

- L.R.

[(2) An order on motion without notice granting leave to issue a certificate of pending litigation shall be served forthwith on any party whose land is affected by the certificate.]

WHERE MOTION TO BE MADE ON NOTICE

42.03 Where the originating process does not include a claim for a certificate of pending litigation, a motion for leave to issue a certificate of pending litigation shall be made to the court on notice and the notice of motion shall contain a description of the lands in question sufficient for registration of the certificate.

42.03 Where Motion to be Made on Notice

Where the originating process does not include a claim for a certificate of pending litigation, a motion for leave to issue a certificate of pending litigation shall be made on notice and the Notice of Motion shall contain a description, sufficient for registration, of the lands in question.

RULE 43 INTERPLEADER

RULE 43 INTERPLEADER

RULE 43 INTERPLEADER

General

- The rule has been reorganized by placing all special provisions relating only to sheriffs at the end, after all provisions relating to interpleader by ordinary litigants. We felt this reorganization would make the rule easier to use. We have also attempted to make the language plainer and simpler.

WHERE AVAILABLE

43.01 Where two or more persons make adverse claims in respect of personal property, including a debt, against a person who,

- (a) claims no beneficial interest in the property, other than a lien for costs, fees, charges or expenses; and
- (b) is willing to deposit the property with the court or dispose of it as the court directs,

the person may obtain relief by interpleader order.

43.01

- Williston 43.01, L.R. The requirement of no interest in the property (other than a lien) is spelled out in 43.02(3)(a), but it seems advisable to give the requirement more prominence.
- Is it desirable to prescribe a form of interpleader order, in view of the long list of possible orders in rule 43.03?

43.01 By Stakeholder

Where a person is under liability for any debt, money, goods or chattels, in respect of which adverse claims have been made against him by two or more persons, either by the commencement of proceedings or otherwise, he may apply to the court for relief by way of interpleader.

HOW OBTAINED

43.02 (1) Where no proceeding has been commenced in respect of the property, the person seeking an interpleader order shall make an application naming all the claimants as respondents and shall require them in his notice of application to attend the hearing and to substantiate or abandon their claims.

(2) Where a proceeding has been commenced in respect of the property, the person seeking an interpleader order shall make a motion in the proceeding on notice to all the claimants and shall require them in his notice of motion to attend the hearing and to substantiate or abandon their claims.

(3) The application or motion shall be supported by an affidavit identifying the property and containing the names and addresses of all claimants to the property of whom the person has knowledge and stating that the person,

- (a) claims no beneficial interest in the property, other than a lien for costs, fees, charges or expenses;
- (b) does not collude with any of the claimants; and
- (c) is willing to deposit the property with the court or dispose of it as the court directs.

43.02(1) and (2)

- Williston 43.03(1) and (3), part, L.R. See also Williston 43.03(7). Instead of saying that certain persons are to be served with notice and are then deemed to be parties, we took the approach of requiring them to be named as parties.

- Williston 43.03(1) allowed a party to an existing proceeding to obtain an interpleader order on motion, but instead of saying as Williston did that an application is to be made by motion, we prefer not to invite confusion of terminology on this point. Accordingly we have provided separately for interpleader motions.

43.02(3)

- Williston 43.03(2), L.R. Is clause (b) necessary at all? Would it be better to say that the application is made in good faith and for no improper purpose? It seems unlikely that the clause performs any function that will not be looked after by the response of another claimant, who will no doubt advise the court if he believes the applicant is in cahoots with a claimant in a scheme of defraud.

43.03 Mode of Application

(1) An application for interpleader relief shall be made by Notice of Application, unless it is made in a proceeding already commenced, in which case it shall be made by Notice of Motion and, in either case, the notice shall call upon the claimants to attend on the return of the application and either to maintain or relinquish their claim.

(3) Notice of an application for interpleader relief shall be served upon every claimant in respect of the property in question and, except in the case of an application by a sheriff, upon every party to the proceeding.

(7) Every person served with notice of an application pursuant to this rule is deemed to be a party to the application.

(2) An application for interpleader relief shall be supported by an affidavit made by the applicant showing the names and addresses of all claimants to the property in question of whom the applicant has knowledge and that the applicant,

- (a) claims no beneficial interest in the property in question, other than a lien for costs, fees, charges or expenses;
- (b) does not collude with any claimant of the property; and
- (c) is willing to deliver the property in question to the court or to dispose of it as the court may direct.

DISPOSITION OF APPLICATION OR MOTION

43.03 On the hearing of an application or motion for an interpleader order the court may grant the person seeking the order relief by declaring that his liability in respect of the property or its proceeds is extinguished and ordering that his costs be paid out of the property or its proceeds, and the court may,

- (a) order a claimant to be made a party to a proceeding already commenced in substitution for or in addition to the person seeking the interpleader order;
- (b) order the trial of an issue between the claimants, define the issue to be tried and direct which claimant is to be plaintiff and which defendant;
- (c) where the question is one of law and the facts are not in dispute, decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the court;
- (d) on the request of a claimant, determine the rights of the claimants in a summary manner, if, having regard to the value of the property and the nature of the issues in dispute, it seems desirable to do so;
- (e) where a claimant fails to attend the hearing, or attends and fails to comply with an order made in the proceeding, make an order declaring the claimant and all persons claiming under him to be forever barred from prosecuting his claim against the person seeking the interpleader order and all persons claiming under him, without affecting the rights of the claimants as between themselves;
- (f) stay any further step in a proceeding; and
- (g) make such other order as is just.

43.03

- Williston 43.04, L.R. The principal features of interpleader relief have been given prominence by moving them up ahead of the clauses.

43.04 Jurisdiction on Application

On the hearing of an application for interpleader relief the court may,

- (a) order a claimant to be made a party in a proceeding already commenced in substitution for or in addition to the applicant;
- (b) order the trial of an issue between the claimants, define the issue to be tried and direct which claimant is to be plaintiff and which defendant;
- (c) where the issue is one of law and the facts are not in dispute, decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the court;
- (d) on the request of any claimant, if, having regard to the value of the subject matter and the nature of the issues in dispute, it seems desirable to do so, determine the rights of the claimants in a summary manner;
- (e) where a claimant fails to attend on the application, or attends and fails or refuses to comply with an order made in the proceeding, make an order declaring the claimant and all persons claiming under him to be forever barred from prosecuting his claim against the applicant and all persons claiming under him, without affecting the rights of the claimants as between themselves;
- (f) stay any further step in a proceeding;
- (g) order the costs of the applicant to be paid out of the property or proceeds;
- (h) declare that the liability of the applicant in respect of the property or the proceeds is extinguished;
- (i) make such other order as may seem just.

INTERPLEADER APPLICATION BY SHERIFF

43.04 (1) A person who makes a claim [^]in respect of [^]property or the proceeds of property taken or intended to be taken by a sheriff in the execution of any enforcement process against another person [^]shall give notice to the sheriff of his claim and his address for service.

(2) On receipt of a claim, the sheriff shall forthwith give notice of claim (Form 43A) by mail addressed to the execution creditor at his address shown on the execution and the execution creditor shall, within seven days after receiving the notice, give the sheriff notice in writing stating whether he admits or disputes the claim.

(3) On receipt of a notice admitting a claim, the sheriff shall release any property in respect of which the claim is admitted, and the court may restrain the bringing of a proceeding against him in respect of his having taken possession of the property and, unless the court orders otherwise, the execution creditor who admits the claim is [^]liable to the sheriff only for any costs, fees and expenses incurred by the sheriff before receipt of the notice admitting the claim.

(4) On receipt of a notice disputing the claim, or on the failure of the execution creditor to give the sheriff the required notice within the time prescribed by subrule (2), the sheriff may make an application for an interpleader order.

43.04

- Williston 43.02 and 43.03(4) and (6). This rule groups all the special provisions applicable to sheriff's interpleader. The special notice to execution creditors has been removed from the rule and is to appear in the forms as Form 42B.
- CAB requested that the sheriff be able to give notice of claim to an execution creditor by notifying his solicitor, but in many cases the solicitor no longer acts for or knows where the find the party. The form of the writ of execution gives an address for the party. We have provided in subrule (2) that the sheriff can mail the notice to that address. CAB also requested a provision like existing 651(2), which permits the sheriff to apply in his own county. Accordingly, we added a new subrule (7).

43.02 By Sheriff

(1) A person, who makes a claim to or in respect of any property taken or intended to be taken by a sheriff in the execution of any process against another person or to the proceeds thereof, shall give notice to the sheriff of his claim and his address for service.

(2) On receipt of a claim, the sheriff shall forthwith give Notice of Claim (Form 43A) to the execution creditor who shall, within 7 days after receiving the notice, give the sheriff notice in writing whether he admits or disputes the claim.

(3) On receipt of a notice admitting a claim, the sheriff shall release any property the claim to which is admitted, and the court may restrain the bringing of a proceeding against him for or in respect of his having taken possession of the property and, unless the court otherwise orders, the execution creditor who admits the claim is only liable to the sheriff for any costs, fees and expenses incurred by the sheriff before receipt of the notice admitting the claim.

(4) On receipt of a notice disputing the claim, or on the failure of the execution creditor to give the sheriff the required notice within the time prescribed, the sheriff may apply for relief by way of interpleader.

(5) The sheriff shall make one application in respect of the property in which he shall name all execution creditors as well as every claimant as respondents.

(6) The notice of application shall include a notice in Form 438.

(7) Where a sheriff has one or more executions issued from one or more county courts, he shall make the interpleader application to the county court in his county, even though he has other executions issued from small claims courts.

(8) Where a sheriff has an execution issued from the Supreme Court, he shall make the interpleader application in the Supreme Court, even though he has other executions issued from county or small claims courts.

(9) Where personal property has been seized in execution by a sheriff, and a claimant alleges that he is entitled to the property as security for a debt, the court may order a sale of the property and direct that the proceeds of sale or an amount sufficient to answer the claim be paid into court pending determination of the claim.

~~438~~(4) Where the applicant is a sheriff, and there is more than one execution creditor in respect of the property in question, he shall make one application and shall serve notice of the application upon all execution creditors as well as upon every claimant.

(5) Where the applicant is a sheriff, notice of the application shall include the following notice:

NOTICE TO EXECUTION CREDITORS

TAKE NOTICE that Section 5 (4) of *The Creditors Relief Act* provides that:

Where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim are entitled to share in any benefit that may be derived from the contestation of such claim so far as is necessary to satisfy their executions or certificates.

(6) Where a sheriff has an execution issued from the Supreme Court, he shall make the application for interpleader relief in the Supreme Court, notwithstanding that he may have other executions issued from county or small claims courts.

~~438~~(5) Where goods or chattels have been seized in execution by a sheriff, and any claimant alleges that he is entitled to such property by way of security for a debt, the court may order a sale of the property and direct that the proceeds therefrom, or sufficient to answer the claim, be paid into court pending determination of such claim.

RULE 44 INTERIM RECOVERY OF PERSONAL PROPERTY

RULE 44 INTERIM RECOVERY OF PERSONAL PROPERTY

- This rule has to be read in conjunction with s.51 of the Judicature Act. That section replaces the Replevin Act (which is to be repealed) and substitutes a right and a procedure more in line with other interim remedies e.g. interim injunctions, certificate of pending litigation.

MOTION FOR INTERIM ORDER

44.01 (1) An interim order under section 51 of the Judicature Act for recovery of possession of personal property may be obtained on a motion to the court by the plaintiff supported by affidavit stating,

- a description of the property sufficient to make it readily identifiable;
- the value of the property;
- that the plaintiff is the owner or lawfully entitled to possession of the property, as the case may be;
- that the property was unlawfully taken from the possession of the plaintiff or unlawfully detained by the defendant, as the case may be; and
- the facts and circumstances giving rise to the unlawful taking or unlawful detention.

44.01(1)

- L.R. Again there is a "reminding" cross-reference to s.51 of the Judicature Act which governs this form of relief.

RULE 44 INTERIM RECOVERY OF PERSONAL PROPERTY

44.01 Motion for Interim Order

(1) An interim order for the recovery of personal property may be obtained on a motion by the plaintiff supported by affidavit containing,

- a sufficient description of the property sought to be recovered to render it readily identifiable;
- the value of the property sought to be recovered;
- a statement that the plaintiff is the owner or lawfully entitled to possession of the property, as the case may be;
- a statement that the property was unlawfully taken from the possession of the plaintiff or unlawfully detained by the defendant, as the case may be; and
- the facts and circumstances giving rise to the unlawful taking or unlawful detention.

(2) The notice of motion shall be served on the defendant unless the court is satisfied that (the property was unlawfully taken from the plaintiff or that) there is reason to believe that the defendant may attempt to prevent recovery of possession of the property or that, for any other sufficient reason, the order should be made without notice.

CONTENTS OF INTERIM ORDER

44.02 An interim order for recovery of possession of personal property shall contain a description of the property sufficient to make it readily identifiable and shall state the value of the property.

44.01(2)

L.R.

Working Group. We have difficulty understanding why satisfying the court that "the property was unlawfully taken from the plaintiff" should be an independent and sufficient ground for proceeding without notice. The other tests in the rule would seem to give the plaintiff all the protection he needs, and would extend to cases of unlawful taking where there is a real need to move without notice. The difficulty we see is that, as drafted, 44.01(2) a plaintiff may by a bold statement of unlawful taking not only get the order but get it without notice. We would recommend the deletion of "unlawful detention" as an independent ground for proceeding without notice.

44.02

- L.R.

(2) A Notice of Motion shall be served on the defendant unless the court is satisfied that the property was unlawfully taken from the plaintiff or that there is reason to believe that the defendant may attempt to prevent recovery of the property or that, for any other sufficient reason, the order should be made without notice.

44.02 Interim Order

An interim order for the recovery of personal property shall contain a sufficient description of the property to be recovered as to make it readily identifiable, and shall state the value of the property.

DISPOSITION OF MOTION

Where Made on Notice

44.03 (1) On a motion for an interim order for [^]recovery of possession of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
- (b) order the defendant to pay into court twice the value of the property as stated in the order, or such other amount as the court directs, or to give [^] the plaintiff security in such form and amount as the court approves, and direct the property to remain in the possession of the defendant; or
- (c) make such other order as is just.

Where Made Without Notice

(2) On a motion for an interim order for the recovery of possession of personal property made without notice to the defendant, the court may,

- (a) order the plaintiff to pay into court twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take and detain the property for a period of ten days after service of the interim order on the defendant before giving it to the plaintiff; or
- (b) make such other order as is just.

44.03

- L.R.

44.03 Jurisdiction on Motion

(1) *Where Made on Notice*

On a motion for an interim order for the recovery of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court twice the value of the property as stated in the order or such other amount as the court may direct, or to give the appropriate sheriff security in such form and amount as may be approved by the court, and direct the sheriff to take the property from the defendant and deliver it to the plaintiff;
- (b) order the defendant to pay into court twice the value of the property as stated in the order, or such other amount as the court may direct, or to give to the plaintiff security in such form and amount as may be approved by the court, and allow the property to remain in the possession of the defendant; or
- (c) make such other order as may seem just.

(2) *Where Made Without Notice*

On a motion for an interim order for the recovery of personal property made without notice to the defendant, the court may,

- (a) order the plaintiff to pay into court twice the value of the property as stated in the order, or such other amount as the court may direct, or to give the appropriate sheriff security in such form and amount as may be approved by the court, and direct the sheriff to take and detain the property for a period of 10 days after service of the interim order upon the defendant before delivering it to the plaintiff; or
- (b) make such other order as may seem just.

WHERE PROPERTY REMOVED

44.08 Where the sheriff reports that the defendant has prevented him from recovering all or part of the property, the plaintiff may move for and the court may grant an order directing the sheriff to take any other personal property of the defendant, to the value of the property that the sheriff was prevented from recovering and deliver it to the plaintiff and directing the plaintiff to hold it until the defendant delivers the property in question to him.

44.08

- L.R.

44.08 Where Property Removed

Where the sheriff reports that the defendant has prevented him from recovering the property or any part thereof, the plaintiff may apply for an order directing the sheriff to take any other personal property of the defendant, to the value of the property which the sheriff was prevented from recovering, and deliver it to the plaintiff who shall hold it until the defendant delivers the property in question to him.

CONDITION AND FORM OF SECURITY

44.04 (1) Where an interim order for the recovery of possession of personal property requires either party to give security, the condition of the security shall be that the party providing the security will return the property to the opposite party without delay if he is ordered to do so, and pay any damages and costs the opposite party has sustained by reason of the interim order.

(2) Where the security is by bond, it shall be in Form 44A and shall remain in force until the security is released under rule 44.06.

(3) Where the security is to be given by a person other than an approved surety company under section 00 of the Judicature Act, the person giving the security shall first be approved by the court.

SETTING ASIDE ORDER

44.05 The defendant may move at any time to set aside or vary an interim order for the recovery of possession of personal property, [^]to stay proceedings under the order or for any other relief with respect to the return, safety or sale of the property [^]by notice of motion served forthwith after the order came to his attention and naming the first available hearing date.

44.04

- L.R.

- Sub-rule (1) and (2) are Williston 44.04, sub-ruled.

- Sub-rule (3) is new. The rule should state that the surety shall be approved by the court, except where it is an approved security company under the Judicature Act (draft act s.70, similar to present s.77).

44.05

- L.R.

44.04 Condition and Form of Security

Where an interim order for the recovery of personal property requires either party to provide security, the condition of the security shall be that the party providing the security will return the property to the opposite party without delay should he be ordered to do so, and pay any damages and costs the opposite party may have sustained by reason of the interim order. Where the security is by bond, it shall be according to Form 44A and shall remain in force until the security is released pursuant to this rule.

44.05 Rescinding Order

The defendant may apply to the court at any time to rescind or vary an interim order for the recovery of personal property, or to stay proceedings thereunder, or for any other relief with respect to the return, safety or sale of the property or any part thereof by Notice of Motion served within 10 days and returnable within 15 days after the order came to his attention.

RELEASE OF SECURITY

44.06 Any security furnished pursuant to an order made under rule 44.03 may be released on the filing of the written consent of the parties or by order of the court.

44.06

- L.R.

44.06 Release of Security

Any security furnished pursuant to an order made under this rule may be released on the filing of the written consent of the parties or by order of the court.

DUTY OF SHERIFF

44.07 (1) Before a sheriff proceeds to enforce an order for the recovery of possession of personal property, he shall satisfy himself that [^]any security required by the order has been given.

44.07

44.07 Duty of Sheriff

(1) Before a sheriff proceeds to enforce an order for the recovery of personal property, he shall satisfy himself that the plaintiff, or the defendant, has furnished any security required by the order.

(2) The sheriff shall serve the order on the defendant either before the property or any part of it has been recovered or as soon thereafter as is possible.

- L.R. At the suggestion of Courts Administration 44.07(2) has been changed to make it clear that the sheriff may serve the order at or before the time of recovery.

(2) The sheriff shall serve the interim order on the defendant as soon as possible after the property or any part thereof has been recovered.

(3) Where the sheriff is unable to comply with the order, or it is dangerous for him to do so, he may move for directions from the court.

(3) Where the sheriff is unable to comply with the order, or it is dangerous for him to do so, he may apply to the court for directions.

(4) The sheriff shall, without delay after attempting to enforce the order and in any event within ten days after service of the order, report to the plaintiff as to the property he has recovered and, where he has failed to recover possession of all or part of the property, as to the property he has failed to recover and the reason for his inability to recover it.

- Sub-rule (4) imposes a more specific time frame for the sheriff reporting to the plaintiff.

(4) Upon the expiration of 10 days after the service of the order, the sheriff shall report without delay to the plaintiff as to the property he has recovered, and, where he has failed to recover possession of all or part of the property, as to the property he has failed to recover and the reason therefor.

SETTING ACTIONS DOWN FOR TRIAL

RULE 45 PLACE OF TRIAL

SETTING ACTIONS DOWN
FOR TRIAL

RULE 45 PLACE OF TRIAL

General

- The working group noted that Rule 45 deals with a subject which must be faced at the time an action is commenced. In county court actions, it regulates the court in which the action is to be commenced as well as the place of trial of the action. In Supreme Court actions, it contains a requirement that the place of trial be named in the statement of claim. The working group proposes an amendment to Rule 16 to spell out in which county court an action must be commenced, the governing principles being that where a statute requires an action be tried in a particular county, the action must be commenced in that county, and otherwise the rules set out in Williston clauses 45.02(a) to (c) will govern. In Supreme Court actions, Rule 16 would require the plaintiff to name a place of trial in his statement of claim in accordance with Rule 45.01 of the redraft.

SUPREME COURT ACTIONS

45.01 (1) In a Supreme Court action the plaintiff shall name as the place of trial in his statement of claim a place in which the court normally sits,

- (a) where a statute requires the trial to be held in a particular county, in that county;
- (b) where all the parties reside in the county where the cause of action arose, [^]in that county;
- (c) where the action is against a municipality, [^]in the county that constitutes the municipality or in which the municipality is situate;)
- (d) in any other action, [^]in any county.

(2) The trial shall be held at the place named in the statement of claim unless an order is made under Rule 45.03.

45.01

- Williston 45.01 and 45.02, L.R. Some examples of statutes requiring trials in a particular place are the County Courts Act, the Libel and Slander Act, the Mechanic's Lien Act, the Mental Incompetency Act, the Mining Act, the Partition Act and the Patent Act. See Rules 72.17 and 73.05 for divorce and family law actions respectively.

45.01 (2)

- New. This provision makes express the assumption that the trial takes place at the place the plaintiff names unless an order is made to change the place of trial.

45.01 To be Named in Statement of Claim

The plaintiff shall name as the place of trial in his Statement of Claim the place where the court normally sits in the county in which he proposes that the action shall be tried.

45.02 Supreme Court Actions

Subject to any special statutory provisions, where the action is commenced in the Supreme Court, the place of trial to be named shall be regulated as follows:

- (a) Where all the parties reside in the county where the cause of action arose, the place to be named shall be in that county.
- (b) Where the action is against a municipal corporation, the place to be named shall be in the county that constitutes that municipality or in which that municipality is situate.
- (c) In any other action, the place to be named may be in any county.

(3) The court may order the trial to be held at another place where

- (a) the place of trial named in the statement of claim is not in accordance with subrule 1;
- (b) the court is satisfied that it would be (clearly) more convenient to hold the trial at another place; or
- (c) the interests of justice would be better served by holding the trial at another place

unless a statute requires the trial to be held at a particular place.

45.01(3)

- Williston 45.04(1), part, L.R. The phrase "at any time" was deleted because it is somewhat misleading in light of the case law, which required the defendant to have filed his defence if he was moving for a change on the ground of balance of convenience, and which barred a motion by the defendant if he had filed his statement of defence where the motion was on the ground that the place of trial selected did not comply with the rules (the "fresh step" bar). The motion on the ground of capriciousness was omitted because this is a classic situation in which the moving party can show that it would be more convenient to try the action somewhere else.
- The working group has suggested the test of "clearly more convenient" as a sort of middle ground between the case law requiring an overwhelming preponderance of convenience and the Williston standard of simply "more convenient", which seems to indicate that it would be easy for the defendant to displace the plaintiff's choice.
- Senior Judge Coe suggested adding a provision for the court to change the place of trial of its

45.04 Motion to Change the Place of Trial

(1) Any party may apply to the court at any time to change the place of trial. Except where the choice of the plaintiff is contrary to the rules or clearly capricious, the applicant must show that it would be more convenient to have the action tried at the place proposed by him or that, in the interests of justice, the action ought to be tried at that place.

own motion in cases where it was clear that the requirements of rule 45.01 had been ignored. The working group understands his concern, but on balance we would not recommend the inclusion of such a provision. There may be many reasons why cases end up being tried at a place which does not conform with the rules, or which appear not to meet the test of convenience. Yet there may be perfectly justifiable reasons for a choice of location which are not readily apparent. For example, the parties may live on one county but conduct business regularly in another county; the trial list in another county may be much shorter; it may be cheaper to bring the parties and the witnesses from Orangeville to Toronto rather than to put counsel up at the Millcroft Inn. We feel that generally judges will not have sufficient information on which to make the decision on their own motion. There is even the risk that some judges would attempt to make use of such a provision when a case was called for trial.

COUNTY COURT ACTIONS

45.02 (1) A county court action shall be commenced in accordance with subrule 16.06(3) and the trial shall be held at a place in which the court normally sits in the county in which the action was commenced unless the order is made under subrule (2).

45.02

- Largely new, but based on Williston 45.03. The rule contains a cross-reference back to Rule 16, which is to contain a new provision regulating in which county court an action is to be commenced.

45.03 County Court Actions

Subject to any special statutory provisions, the place of trial to be named in a county court action shall be regulated by the rule governing the place of trial in a Supreme Court action and the action shall be commenced in the county in which the action is to be tried.

(2) The court in which the action was commenced or a master of the Supreme Court may order the action to be transferred to another county court where,

(a) the action was commenced in a county court other than as required by subrule 16.06(3);

(b) the court or master is satisfied that it would be (clearly) more convenient to transfer the action to another county court; or

(c) the interests of justice would be better served by transferring the action to another county court

unless a statute requires the trial to be held at a particular place.

(3) Where an order is made under subrule (2), the action shall be continued as if it had been commenced in the court to which it is transferred.

45.02(2)

- Williston 45.04(2), part, L.R. Parallels 45.03.

45.02(3)

- Williston 45.04(2), part, L.R.

Williston 45.04(3)

- This provision, which is similar to section 63 of the present Judicature Act, is to be deleted from the rules and returned to the Judicature Act (where, like its predecessor, nobody will find it). The provision deals with the contractual rights of the parties.

(2) In a county court action, a motion to change the place of trial may be made to the judge of the county court in which the action was commenced or to a master of the Supreme Court. Where such an order is made, the action shall be transferred to the appropriate county court. Thereafter, the action shall be styled in the court to which the proceeding is transferred and shall be proceeded with as if it had been commenced in that court.

(3) On any motion to change the place of trial, no agreement made prior to the commencement of an action as to the place of trial shall have any force or effect.

RULE 46 JURY NOTICE

ACTIONS TO BE TRIED WITH A JURY

46.01 (1) A party to an action may require that the trial be with a jury by delivering a jury notice (Form 46A) at any time before any party commences an oral examination for discovery or serves written questions under rule 34.01 or the action is set down for trial, unless it is required by subsection 65(2) of the Judicature Act or any other statute that the action be tried without a jury.

(2) An action for libel, slander, malicious arrest, malicious prosecution or false imprisonment shall be tried with a jury without the delivery of a jury notice unless the parties file a consent in writing to a trial without a jury.

RULE 46 JURY NOTICE

46.01

- Williston 46.01, L.R. and split into subrules. The working group felt that it was somewhat precipitous to require a jury notice to be served before or immediately after pleadings close (as in subs. 62(1) of the present Act). We opted instead to cut off the right to serve a jury notice at the time discovery (oral or written) commences.
- SJC asked for a link between section 65 of the draft Act, which deals with jury trials, and the rule. This has been done in subrules (1) and (2). The issue of whether actions against municipalities can be jury cases is one of policy for the Act.

46.01(2)

- Working Group. The Ministry is considering whether jury trials will continue to be available in these actions as an absolute right. Assuming that they are, is there any reason why a jury notice should not be required? It would be easier for the court office if the right to a jury trial were flagged in this way.

RULE 46 JURY NOTICE

46.01 Actions Which may be Tried With a Jury

Subject to the provisions of any statute, any party desiring to have the issues of fact tried or the damages assessed by a jury may, at any time before the close of pleadings, serve on every other party to the action and file, with proof of service, a Jury Notice (Form 46A) in which case, unless otherwise ordered, the facts shall be tried or the damages assessed accordingly.

STRIKING OUT JURY NOTICE

Where Statute Requires Trial without a Jury

46.02(1) Where a jury notice has been served in an action required by statute to be tried without a jury, any party may make a motion to the court for an order striking out the jury notice.

Where Jury Trial Inappropriate

(2) Where a jury notice has been served, [^]any party may make a motion to a judge at any time for an order striking out the notice.

(3) Where it appears to the judge that the action [^]ought to be tried without a jury, he shall make an order striking out the notice and, where the action has been placed on a list of jury actions for trial, the action shall be transferred to a list of non-jury actions for trial.

(4) Where, on motion, an order to strike out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury.

46.02

- Williston 46.02, L.R. Williston subrule (2) has been split.

46.02 Striking Out Jury Notice

(1) Where a Jury Notice has been served in an action required by statute to be tried without a jury, any party to the action may apply to the court for an order striking out such notice.

(2) Where a Jury Notice has been served and filed pursuant to Rule 46.01, any party may apply to a judge at any time for an order striking out the notice. Where it appears to the judge that the action is one which ought to be tried without a jury he shall make an order striking out the notice, and, in case the action has been placed on a list of jury actions for trial, he shall order the action to be transferred to a list of non-jury actions for trial. The refusal of such an order shall not interfere with the discretion of the trial judge, in a proper case, to try the action without a jury.

RULE 47 PROCEDURE ON SETTING DOWN

WHEN ACTION MAY BE SET DOWN AND BY WHOM

47.01 At any time after the close of pleadings, any party to an action, including a party to a counterclaim or cross-claim who is not in default under these rules or an order of the court, may set the action, including any counterclaim or cross-claim down for trial.

HOW ACTION IS TO BE SET DOWN

47.02 (1) Where an action is defended, the action may be set down for trial by,

- (a) delivering a notice of trial (Form 47A); and
- (b) filing a trial record prepared in accordance with rule 47.03.

(2) Where an action is undefended, the action may be set down for trial by filing a trial record prepared in accordance with rule 47.03.

RULE 47 PROCEDURE ON SETTING DOWN

47.01

- Williston 47.01, L.R.

47.02

- Williston 47.02, L.R. As motions and applications have records under the revised rules, the name "trial record" has been adopted.

RULE 47 PROCEDURE ON SETTING DOWN

47.01 When Action may be Set Down and by Whom

At any time after the close of pleadings, any party to an action, including a party to any counterclaim or cross-claim in the action who is not himself in default under these rules, or under any order of the court, may set the action, including any counterclaim or cross-claim therein, down for trial.

47.02 How Action is to be Set Down

(1) Where an action is defended, the action may be set down for trial by,

- (a) serving on every other party and filing a Notice of Trial (Form 47A) with proof of such service; and
- (b) filing a record prepared in accordance with the requirements of Rule 4.09.

(2) Where an action is undefended, the action may be set down for trial by filing the record required by paragraph (1)(b).

TRIAL RECORD

- 47.03 (1) The trial record shall contain,
- (a) a cover page, containing a statement as to whether or not there is a third or subsequent party claim or a related proceeding in the same or any other court and giving the title and court file number of the related proceeding;
 - (b) an index;
 - (c) a copy of any jury notice;
 - (d) a copy of the pleadings, including those relating to any counterclaim or cross-claim;
 - (e) a copy of any demand or order for particulars and the particulars delivered in response;
 - (f) a copy of any financial statement delivered under rule 72.14 or 73.03;
 - (g) a copy of any order respecting the trial; and
 - (h) a memorandum signed by the registrar stating that,
 - (i) the record contains a copy of all pleadings in the action, all particulars ordered to be delivered and all orders respecting the trial,
 - (ii) the time for delivery of pleadings has expired;
 - (iii) any defendant who has failed to deliver a statement of defence has been noted in default, and
 - (iv) where applicable, judgment has been obtained, or the action has been discontinued or dismissed, as against any defendant, as the case may be.

47.03

- Williston 4.09, L.R. The working group felt the contents of the trial record should appear here because it would be looked for here as counsel prepared to set a case down.
- The cover page is to contain a reference to other related proceedings for the assistance of the court, especially on a pre-trial conference.
- Clause (f) now appears in the rules, but was left out of Williston.
- Does clause (h) serve a useful purpose? Would it be better to require counsel to certify as to these items? The working group wonders about the workload implications for court offices.

4.09 Trial Record

(1) The record to be filed when an action is set down for trial shall contain,

- (a) a copy of any Jury Notice;
- (b) a copy of the pleadings, including those relating to any counterclaim or cross-claim;
- (c) a copy of any demand or order for particulars and the particulars delivered pursuant thereto; and
- (d) a memorandum signed by the registrar stating that,
 - (i) the record contains a copy of all pleadings in the action and all particulars ordered to be delivered therein and that the time for delivery of any pleadings has expired;
 - (ii) any defendant who has failed to deliver a Statement of Defence has been noted in default; and
 - (iii) where applicable, judgment has been obtained, or the action has been discontinued or dismissed, as against any defendant, as the case may be.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

WILLISTON'S PROPOSED RULES

- (2) There shall be attached to the record before the trial a copy of,
- (a) any order respecting the trial,
 - (b) any memorandum signed ^{or} order made [^] following a pre-trial conference; and
 - (c) in an undefended action, any affidavit to be used in evidence.

PLACING UNDEFENDED ACTION ON LIST FOR TRIAL

47.04 An undefended action shall be placed on the list for the trial of undefended actions forthwith after it has been set down for trial.

PLACING DEFENDED ACTION ON LIST FOR TRIAL

47.05 A defended action shall be placed on the list for the trial of defended actions with or without a jury, as the case may be, [^]

- (a) sixty days [^] after the action was set down for trial; or
- (b) forthwith after the filing of a consent in writing by every [^] party.

47.04

- Williston 47.03.

47.05

- Williston 47.04, L.R.

- (2) There shall be attached to the record a copy of,
- (a) any order respecting the trial;
 - (b) any memorandum signed by counsel or order by the court following a pre-trial conference, and
 - (c) in an undefended action, any affidavit to be used in evidence.

47.03 Placing Undefended Action on List for Trial

An undefended action shall be placed on the list for the trial of undefended actions forthwith after it has been set down for trial.

47.04 Placing Defended Action on List for Trial

A defended action shall be placed on the list for the trial of defended actions with or without a jury, as the case may be, when,

- (a) 60 days have elapsed from the date the action was set down for trial; or
- (b) forthwith upon the filing of a consent in writing by every other party.

EFFECT OF SETTING DOWN OR CONSENT

47.06 (1) Any party who sets the action down for trial and any party who consents to the action being placed on the list for trial shall be deemed [^]to have certified that he is ready for trial and he shall not initiate or continue any motion or any form of discovery without leave of the court.

(2) Subrule (1) does not relieve a party from any obligation imposed upon him by rules 31.07 (disclosure of documents or errors subsequently discovered), 31.09 (abandonment of claim of privilege), 32.09 (disclosure of information subsequently obtained) and 52.01 (service of report of expert witness), or preclude him from resorting to the provisions of rules [^]47.12 (request to fix date for trial) and 51 (notice to admit).

EFFECT OF ACTION BEING PLACED ON LIST FOR TRIAL

47.07 As soon as an action is placed on the list for trial, all parties shall be deemed to be ready for trial and, subject to any order made under subrule 47.06(1), no party is entitled to an adjournment of the trial on the ground that some interlocutory proceeding or form of discovery has not been initiated or completed.

47.06

- Williston 47.05, L.R. Parenthetical explanations of the rule references have been added. Have any rules been left out?

47.07

- Williston 47.06, L.R.

47.05 Effect of Setting Down or Consent

(1) Any party who sets the action down for trial and any party who consents to the action being placed on the list for trial shall, by virtue of so doing, be deemed to have certified that he is ready for trial and he shall not initiate or continue any motion or any form of discovery without leave of the court.

(2) Nothing in paragraph (1) shall relieve a party from any obligation imposed upon him by Rules 31.07, 31.09, 32.09 and 52.01, or preclude him from resorting to the provisions of Rules 31.10, 47.12 and 51.01.

47.06 Effect of Action Being Placed on List for Trial

As soon as an action is placed on the list for trial, all parties shall be deemed to be ready for trial and, subject to any order made under Rule 47.05, no party shall be entitled to an adjournment of the trial on the ground that some interlocutory proceeding or some form of discovery has not been initiated or completed.

POSITION OF ACTIONS ON LIST FOR TRIAL

47.08 Where an action is qualified to be placed on a list for trial in accordance with Rule 47, it shall be placed at the end of the appropriate list.

SEPARATE LISTS FOR TRIAL

47.09 (1) Actions to be tried with a jury shall be placed on a list of jury actions for trial and actions to be tried without a jury shall be placed on a list of non-jury actions for trial.

(2) Where the next scheduled sitting in a place outside of Toronto is for the trial of jury actions, non-jury actions shall be placed for trial at the end of the list for jury actions.

SPECIAL PROVISIONS FOR COUNTY COURT OF THE JUDICIAL DISTRICT OF YORK

47.10 (1) Rules 47.08 and 47.09 do not apply to the County Court of the Judicial District of York.

(2) In the County Court of the Judicial District of York, where an action is set down for trial it shall be given a trial date by the court.

SEPARATE SPEEDY TRIAL LIST

47.11 There shall be a separate list of actions requiring speedy trial on which only actions for which a speedy trial has been ordered shall be listed.

47.08

- Williston 47.07, L.R. See also 47.10 below.

47.09

- Williston 47.08, L.R., split into subrules. See also 47.10 below.

47.10

- New. Designed to reflect York County Court practice of fixing trial dates.

47.11

- Williston 47.09, L.R.

47.07 Position of Actions on List for Trial

When an action is entitled to be placed on a list for trial in accordance with this rule, it shall be placed at the foot of the appropriate list.

47.08 Separate Lists for Trial

Actions to be tried with a jury shall be placed on a list of jury actions for trial and actions to be tried without a jury shall be placed on a list of non-jury actions for trial; provided, however, that in the case of actions to be tried elsewhere than at Toronto, non-jury actions shall be placed at the end of the list of jury actions for trial when the next scheduled sitting is for the trial of jury actions only.

47.09 Separate List for Actions Requiring Speedy Trial

There shall be a separate list of cases requiring speedy trial on which only those cases in respect of which a speedy trial has been ordered shall be listed.

ACTIONS TRAVERSED OR REMAINING ON LIST
AT CONCLUSION OF SITTINGS

47.12 Unless otherwise ordered by the trial judge, all actions traversed to the next sittings and all actions remaining on the list for trial at the conclusion of any sittings shall stand in the same order at the start of the next appropriate list of actions for trial, and it is not [^] necessary to set the action down for trial again or deliver [^] another notice of trial.

ACTIONS STRUCK OFF LIST

47.13 Where an action is struck off the list, it shall not be restored to a list for trial except by leave of a judge, but the action may be [^] set down for trial again under rule 47.04 or 47.05.

47.12

- Williston 47.10, L.R.

47.13

- Williston 47.11, L.R.

47.10 Actions Traversed or Remaining on List at
Conclusion of Sittings

Unless otherwise ordered by the trial judge, all actions traversed to the next sittings and all actions remaining on the list for trial at the conclusion of any sittings shall stand in the same order at the head of the next appropriate list of actions for trial, and it shall not be necessary to again set the action down for trial or serve and file another Notice of Trial.

47.11 Actions Struck off List

Where an action is struck off the list, it shall not be restored to any list for trial except by leave of a judge, but any such action may be re-set down for trial and a new Notice of Trial served and filed, with proof of service.

[FIXING DATE FOR TRIAL IN SPECIAL CASES

47.14 (1) Where an action has been set down for trial and there is some special reason why the date for trial ought to be fixed, a party may request the Chief Justice of the High Court or [^] anyone designated by him to fix a date by delivering a request to fix date for trial (Form 47B).

(2) A party served with a request to fix date for trial may, within ten days after service of the request on him, deliver a response to request to fix date for trial (Form 47C).

(3) [^] A request to fix a date for trial may be made jointly by all parties by filing a joint request to fix date for trial (Form 47D).

(4) If the Chief Justice of the High Court, or the person designated by him, is not satisfied that he can dispose of the request without hearing counsel, he may appoint a time for the making of oral representations.

(5) Where a request is made under this rule, the request and the disposition thereof [^] shall be attached by the registrar to the trial record.

(6) In county court actions, [^] a request under this rule shall be made to a county court judge or a person designated by him.

(7) This rule does not apply to the County Court of the Judicial District of York.

47.14

- Williston 47.12, L.R. The working group wonders whether this rule should be deleted. In York County Court, it does not fit with the assignment system now in use. Elsewhere, it might well be overused by counsel who would attempt to jump the queue of cases waiting for trial and might result in a flurry of unmeritorious requests in not very special cases.

47.12 Fixing Date for Trial in Special Cases

(1) Where an action has been set down for trial and there is some special reason why the date for trial ought to be fixed, any party may apply to the Chief Justice of the High Court, or to anyone designated by him, by serving and filing, with proof of service, a Request to Fix Date for Trial (Form 47B).

(2) Any party served with a Request to Fix Date for Trial may, within 10 days thereafter, serve and file, with proof of service, a Response to Request to Fix Date for Trial (Form 47D).

(3) Such a request may be made jointly by all parties to the action by filing a Joint Request to Fix Date for Trial (Form 47C).

(4) If the Chief Justice of the High Court, or his designee, is not satisfied that he can dispose of the request without hearing counsel, he may appoint a time for the making of oral representations.

(5) Where a request is made under this sub-rule, the request and the disposition thereof by the Chief Justice, or his designee, shall be attached by the registrar to the original record.

(6) In county court actions, such a request shall be made to the county court judge, or his designee.

APPLICATION OF RULE

47.15 Rule 47 applies to any proceeding in which the court has directed the trial of an issue, unless otherwise ordered.

DUTY TO INFORM REGISTRAR

47.16 Every party to an action (set down for trial) shall promptly inform the registrar as to any settlement of the action.

47.15

- Williston 47.13, L.R., subrule (2) deleted. The working group wonders why the general setting down rules should not apply to cases ordered for speedy trial, subject to the order for speedy trial.

47.16

- Williston 47.14. The working group wonders whether the rules should require parties to notify the court of settlements no matter when they occur. Is the status hearing procedure of rule 26.05 sufficient to cover this, or should the parties have an obligation to notify the court?

New provision

- The working group proposed on page 130 above that rule 26.05 be brought into Rule 47 - as 47.08? At the end?

47.13 Application of Rule

(1) The provisions of this rule shall apply to any proceeding wherein the court has directed the trial of an issue, unless otherwise ordered.

(2) Except as provided in Rule 47.11, the provisions of this rule shall not apply where the court has ordered an action to be placed on a list of actions requiring speedy trial.

47.14 Duty to Inform Registrar

Every party to an action set down for trial shall promptly inform the registrar as to any settlement of the action.

26.05 Failure to Set Action Down for Trial Within One Year

(1) Every registrar shall maintain a list of all actions in which, after the coming into force of these rules, a Statement of Defence is filed in his office. An action shall only be removed from that list when the action has been set down for trial or terminated.

(2) When an action has been on the list for one year, the registrar shall mail to the solicitors of record, or, where there is no solicitor of record, to the party, a Notice of Status Hearing (Form 26A) at least 60 days before the date fixed for the hearing.

(3) Unless the action has been set down for trial or terminated before the date fixed for the hearing, the solicitors of record shall attend and the parties may attend on the hearing. Where a party represented by a solicitor does not attend, the solicitor shall, on the hearing, file proof that a copy of the notice was served on his client.

(4) On the status hearing, the judge shall order the action to be set down for trial within a time limit specified in the order, or he may adjourn the hearing to a fixed date or make such other order as may seem just.

(5) Unless the action is set down for trial within the time limit so ordered, or it is terminated in the meantime, the registrar shall dismiss the action for want of prosecution.

RULE 48
PAYMENT INTO COURT IN SATISFACTION

Working Group. We recommend deletion of this rule because, with the addition of 49.07(2) and (3) to the Offer to Settle rule (permitting the plaintiff to impose as a term of any offer that money be paid into court) rule 48 would serve no useful purpose. Only a defendant can activate rule 48 and he would rarely if ever wish to do so since he can get the same cost consequences, without having to put money into court, by using an offer to settle. Any protection that this payment into court procedure may have offered the plaintiff in the past will no longer be available to him because the defendant can always choose to use the offer to settle procedure.

- If the subcommittee agrees that rule 48 should, in general, be deleted there are certain provisions in the rule which may have to be provided for elsewhere. These include tender before action (48.08(3)) the administrative details with regard to obtaining payment out of court (49.07) and the provisions in the Libel and Slander Act providing for payment into court.

RULE 48 PAYMENT INTO COURT IN SATISFACTION

48.01 Where Available

In any action a defendant may pay into court a sum of money in satisfaction of any claim made by a plaintiff, or, where there is more than one claim, in satisfaction of any one or more of them.

48.02 Time for Payment into Court

(1) Except where tender before action is pleaded, payment into court in satisfaction may be made at any time before the commencement of the trial; provided, however, that where such payment into court is made less than 10 days before the day on which the trial commences, it shall have no effect on the costs of the action unless, in the meantime, it has been accepted by the plaintiff.

(2) Where tender before action is pleaded, the sum alleged to have been tendered shall be paid into court forthwith.

48.03 Notice of Payment into Court

On making a payment into court under this rule, a defendant shall forthwith serve upon the plaintiff a Notice of Payment into Court (Form 48A) which shall specify the claim or claims in respect of which such payment is made and the amount of such payment in respect of each claim, but such Notice shall not be filed.

48.04 When Payment into Court may be Revoked

(1) Except where tender before action is pleaded, a payment into court is irrevocable for a period of 10 days from the date of service of the Notice of Payment into Court but, unless and until accepted by the plaintiff, any such payment may thereafter be revoked by the defendant serving upon the plaintiff a Notice of Revocation (Form 48B) at any time before the commencement of the trial.

(2) Where tender before action is pleaded, a payment into court is irrevocable.

(3) Where a Notice of Revocation has been served, the payment into court so revoked shall have no effect on the costs of the action.

(4) Upon filing a Notice of Revocation with proof of service thereof upon the plaintiff, the defendant shall be entitled to have the money in court paid out to him.

48.05 Effect of Payment into Court

Except in an action in which a payment is made under *The Libel and Slander Act*, or in which tender before action is pleaded,

- (a) payment into court under this rule shall be deemed to be an offer of compromise made without prejudice and shall not be taken as an admission of liability for the claim in respect of which it is made, unless the Notice of Payment into Court otherwise provides; and
- (b) no statement of the fact that money has been paid into court under this rule shall be contained in the pleadings, and no communication of that fact shall be made to the trial judge or the jury until all questions of liability and the amount of debt or damages have been decided.

48.06 Notice of Acceptance

Where money is paid into court under this rule, the plaintiff may accept the whole sum, or any one or more of the specified sums, in satisfaction of the claim or claims to which the specified sum or sums relate by serving upon the defendant and filing, with proof of service, a Notice of Acceptance (Form 48C).

48.07 Time for Acceptance

Notice of Acceptance may be served and filed at any time before the commencement of the trial unless, in the meantime, the payment into court has been revoked by the defendant.

48.08 Effect of Acceptance

(1) Subject to paragraph (2), where the plaintiff accepts the money paid into court in satisfaction of all claims in the action, the plaintiff may tax his party and party costs of the action to the date he was served with the Notice of Payment into Court and, unless the defendant pays those costs within 7 days after taxation, issue execution therefor.

(2) Where the defendant has pleaded tender before action and the plaintiff accepts the money paid into court in satisfaction of all claims made in the action, the defendant may, unless otherwise ordered, tax his party and party costs of the action and the amount thereof shall be paid to him out of the money in court, and the balance shall be paid to the plaintiff.

(3) Where the money paid into court in satisfaction has been accepted, all further proceedings in the action or in respect of the specified claim or claims, as the case may be, shall be stayed and the money shall not be paid out except upon the filing of an affidavit of the plaintiff, or his solicitor, that the plaintiff is not under disability and is personally entitled to the money, or by the order of a judge.

48.09 Effect of Failure to Accept

(1) Where money is paid into court under this rule and the plaintiff does not accept the sum so paid in satisfaction of the claim in respect of which the payment into court was made, but proceeds with the action in respect of such claim,

(a) the money shall remain in court, unless the payment into court has been revoked, and shall not be paid out except upon filing the consent of all parties and an affidavit by the party to whom payment out is to be made, or his solicitor, that such party is not under disability and is personally entitled to the money, or by the order of a judge; and

(b) the amount paid into court shall be applied, so far as is necessary, in satisfaction of any judgment recovered by the plaintiff against the defendant, and the balance, if any, shall be repaid to the defendant.

(2) Where a Notice of Payment into Court was served at least 10 days before the day on which the trial commenced and the payment into court has not been revoked, a plaintiff, who fails to obtain judgment for more than the amount paid into court, shall only be entitled to his party and party costs to the date of service of the Notice of Payment into Court and the defendant shall be entitled to his party and party costs from the date of such service, unless the trial judge otherwise orders.

48.10 Interest on Money in Court

Any defendant who has made a payment into court under this rule is entitled to the interest earned on that payment while it remained in court, unless that payment is not sufficient to satisfy the judgment obtained by the plaintiff, in which case the plaintiff is entitled to the whole or any part of such interest as may be necessary to satisfy his judgment, unless otherwise ordered.

48.11 By Multiple Defendants

(1) Where two or more defendants are jointly, or jointly and severally, liable to the plaintiff in respect of any particular claim or claims, any payment into court in satisfaction of any such claim or claims shall be deemed to have been made by, or on behalf of, all such defendants and Notice of Payment into Court shall be served on all of the other defendants as well as upon the plaintiff.

(2) The acceptance of any such payment by the plaintiff shall release all such defendants from any further liability to the plaintiff in respect of such claim or claims.

48.12 Application to Counterclaim

The provisions of this rule shall apply, with any necessary modification, to any counterclaim.

PREPARATION FOR TRIAL

RULE 49 OFFER TO SETTLE

PREPARATION FOR TRIAL

RULE 49 OFFER TO SETTLE

RULE 49 OFFER TO SETTLE

Working Group. This rule presents one policy issue which is more easily discussed at the outset than through looking at individual rules (because it comes up in several places). Should a party be entitled to "automatic" cost consequences (revised Rule 49.10) in respect of an offer which is limited as to time or withdrawn before trial? Put another way, should the only offers which attach the automatic cost consequences, be those which are open until the commencement of trial? This seemed to be the effect of Williston 49.09 and 49.04 - no automatic cost consequences re revoked offers - though apparently the court would still consider such offers in its discretion under Williston 49.11. This also seems to be what present R. 775(i)(6) (see revised rule 49.06 (3)) is getting at - total ban on disclosure of withdrawn offers.

The basic idea behind these provisions (though the two are not identical) seems to be by analogy to the payment into court rule i.e. to be effective re costs the offer must be available to the opposing party right up until the commencement of the trial. The Working Group agrees that in many instances it would be unfair for a plaintiff to be stuck with automatic cost consequences by an offer of the defendant which was once made available and then withdrawn e.g. a defendant offers to settle for

\$30,000.00, open for 30 days, 6 months prior to trial and at that time the plaintiff declines, but 2 weeks before trial he indicates he will now accept it and the defendant says the offer is no longer available. However, the plaintiff can deal with this problem (re cost consequences) himself - by simply making at that time a written offer to settle for \$30,000.00. For costs purposes this would have the effect of "reinstating" the defendant's offer. Consequently, (if this analysis is correct,) we see no reason for requiring that to attract the automatic cost consequences an offer should have to be open right down to the commencement of the trial or hearing. Of course, in exercising the discretion it has re automatic cost consequences ("unless otherwise ordered" see revised rule 49.10(1) & (2)) the court can deal appropriately with any offer that was open only for an unreasonably short time, etc.

A further issue is the present R.775 (i)(6) (see revised rule 49.06(3)) - the wisdom of forbidding the disclosure to the court, at anytime, of an offer which has been withdrawn. We are not sure as to either the purpose or scope of this provision (would it include any offer not open until trial?) but we have included it for consideration and decision by the Sub-committee. We recommend against its inclusion (assuming that we understand its import correctly) since, as

already indicated, the opposing party can always in effect reinstate a withdrawn offer by making a counter offer in the same terms; so there is no reason for a total ban on the disclosure of withdrawn offers to the court.

Working Group. Subsequent to the Williston Rules, new rules were drafted for the Provincial Court (Civil Division). Those rules adopted the offer to settle procedure and simplified and reworded much of Williston Rule 49. The revised rule includes several provisions taken from the Provincial Court (Civil Division) Rules.

DEFINITIONS

49.01 In Rule 49,

(a) "defendant" includes a respondent;

(b) "plaintiff" includes an applicant.

WHERE AVAILABLE

49.02 A party to a proceeding may serve on any other party an offer in writing to settle any claim in the proceeding on the terms specified in the offer.

49.01

- no change.

49.02

- L.R.

49.01 Definitions

In this rule,

plaintiff includes an applicant;

defendant includes a respondent.

49.02 Where Available

Any party to a proceeding may serve upon an adverse party an offer in writing to settle any claim in a proceeding and, where there is more than one claim, to settle any one or more of them, on the terms therein specified.

TIME FOR MAKING OFFER

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the trial or hearing, the costs consequences referred to in rule 49.10 do not apply.

49.03

L.R.

Working Group. The Williston Committee provided that for the "automatic" cost consequences to apply to an offer (see Williston rule 49.09). The offer must have been made no less than 10 days before the trial or hearing. We approve of the general principle - the party should not leave making realistic offers until the eve of trial when preparation costs are being incurred, particularly under the new rules which provide for earlier and fuller disclosure. However, we feel the time should be shortened slightly to take into account that the time for the delivery of trial experts reports is 10 days before trial.

Tying the cut off point to the trial date (which will usually be an uncertain date) is unfortunate, but we cannot see a better solution.

49.04(1)

- L.R.

WITHDRAWAL OF OFFER

49.04 (1) An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal on the party to whom the offer was made.

49.03 Time for Making Offer

An offer to settle may be made at any time before the court disposes of the claim or claims in respect of which the offer is made; provided, however, that where such offer to settle is made less than 10 days before the day on which the trial or hearing of the proceeding is commenced, the cost consequences prescribed by this rule shall not apply thereto unless, in the meantime, it has been accepted.

49.04 When Offer to Settle may be Revoked

(1) An offer to settle may be revoked by the party who made the offer serving upon the party to whom the offer was made a notice of revocation at any time before it is accepted.

Williston 49.04(2) and (3)

Deleted. Working Group. See the discussion at the beginning of this rule. [If it is decided that revoked - withdrawn offers are not to carry the "automatic" cost consequences; we feel that a better way to express this is to include the bracketed words in revised rule 49.10. A particular drawback of Williston 49.04(2) and(3) is that one particularly reasonable form of time limited offer (open until the commencement of trial) would have been deemed a revoked offer and the automatic cost consequences would not attach].

(2) Unless otherwise provided in the offer it terminates with, and cannot be accepted after, the commencement of the trial or hearing.

49.04(2)

New. Working Group. This provision is included simply as a "benchmark" around which the parties can make their offers. It will avoid the situation where a party, though he never intended the offer to be open for acceptance after the commencement of the trial, finds his offer being accepted after the trial starts when his opponents case "goes badly". If a party wants his offer to be capable of acceptance after the trial commences, he merely has to so state.

49.05

- Williston 49.05(1)

EFFECT OF OFFER

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice, and shall not be taken as an admission of liability, unless the offer provides otherwise.

(2) Where an offer to settle stipulates a time for acceptance and is not accepted within the time so stipulated, it shall be deemed to have been revoked.

(3) The cost consequences prescribed by this rule shall not apply to an offer to settle which has been revoked.

49.05 Effect of Offer

(1) An offer to settle shall be deemed to be an offer of compromise made without prejudice, and shall not be taken as an admission of liability, unless the offer to settle otherwise provides.

DISCLOSURE OF OFFER TO COURT

49.06 (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading.

(2) Where an offer is not accepted, no communication respecting the offer shall be made to the court or jury on the trial or hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.

[(3) Where an offer is withdrawn no communication respecting the offer shall be made to the court at any time.]

ACCEPTANCE OF OFFER

Generally

49.07 (1) An offer to settle may be accepted by serving a written acceptance on the party who made the offer at any time before it is withdrawn.

49.06(1) and (2)

Williston 49.05(2), subruled and given a more accurate and informative heading, L.R.

Working Group. Williston's non-disclosure provision was carefully worded so as to permit disclosure of unaccepted offers at a pre-trial conference. This aspect has been retained in revised rules 49.06(1) and (2) (but see revised rule 49.06 (3))

49.06(3)

New. Working Group. This provision appears in the present rules - R.775(i)(6) and is included here for a policy decision by the Sub-committee. As indicated in the discussion at the beginning of this rule we recommend against its inclusion.

49.07(1)

Williston 49.06 and 49.07, combined and L.R. (taken from Provincial Court Rules). The words "or the court disposes of the claim in respect of which the offer is made" (see Williston 49.07) have been deleted in light of 49.04(2).

(2) No statement of the fact that an offer to settle has been made shall be contained in the pleadings, and no communication of that fact shall be made to the court or jury on the trial or hearing of the proceeding until after all questions of liability and the relief to be granted have been decided.

49.06 Acceptance of Offer

Where an offer to settle has been served, the party to whom the offer is made may accept such offer by serving notice of acceptance on the party who made the offer.

49.07 Time for Acceptance

A notice of acceptance may be served at any time before the court disposes of the claim or claims in respect of which the offer is made, unless, in the meantime, the offer has been revoked.

Payment into Court as Term of Offer

(2) An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court and the defendant may accept the offer only by paying the money into court and notifying the plaintiff of the payment in.

Payment into Court as a Condition of Acceptance

(3) Where a defendant offers to pay money to the plaintiff in settlement of a claim, the plaintiff may accept the offer on condition that the defendant forthwith pay the money into court and, where such an offer is so accepted and the defendant fails to pay the money into court, the plaintiff may avail himself of the remedies provided in rule 49.09 in the same manner as if the failure were a failure to comply with the terms of an accepted offer.

Costs

(4) Where an accepted offer to settle is silent as to costs, the plaintiff may,

(a) where the offer was made by the defendant, tax his costs to the date the plaintiff was served with the offer; or

(b) where the offer was made by the plaintiff, tax his costs to the date he was served with notice of acceptance,

and unless the defendant pays those costs within seven days after taxation, enter judgment for the amount of the costs and issue execution.

49.07 (2) and (3)

New. Working Group. We believe that these provisions, which were added to the Provincial Court rules are essential. As the Williston Rules 48 and 49 stood, any protection offered to the plaintiff by the payment into court rule (i.e. proof that the defendant indeed had the money to pay the proposed settlement) was lost, because the defendant could achieve the same cost consequences by using the offer to settle rule. [If not already added by the time the revised rule is typed, provisions will probably be needed to deal with the payment out of court of such money].

49.07(4)

Williston 49.08 (3) and (4) combined and L.R. (taken from the Provincial Court Rules).

(3) Where the accepted offer is silent as to costs, and the offer was made by the defendant and accepted by the plaintiff, the plaintiff may tax his party and party costs of the proceeding to the date he was served with the offer to settle and, unless the defendant pays those costs within 7 days after taxation, issue execution therefor.

(4) Where the accepted offer is silent as to costs, and the offer was made by the plaintiff and accepted by the defendant, the plaintiff may tax his party and party costs of the proceeding to the date he was served with the notice of acceptance and, unless the defendant pays those costs within 7 days after taxation, issue execution therefor.

(5) Where an offer to settle made at least seven days before the trial or hearing is accepted on the eve of the trial or hearing, a judge may on motion allow the party who made the offer a fee for preparation for trial.

49.07(5)

New. Modelled after, but not identical to, the Provincial Court Rules. Working Group. This provision is designed to deal with the following type of situation: the defendant makes an offer 10 days before trial which is accepted by the plaintiff the day before trial. Revised rule 49.07(4) deals with the plaintiff's costs entitlement. However, because of the plaintiff's tardiness the defendant will likely have gone ahead and prepared for trial. It seems fair that he should be entitled, at least in some cases, to get an order for costs to cover his preparation. Should this rule, like 49.07(4) be qualified by "where the accepted offer is silent as to costs"? The rule provides for application to a judge (and therefore not to a master) is this O.K.?

Incorporating into Judgment

(6) Where an offer is accepted, the court may incorporate any of its terms into a judgment.

49.07(6)

- New. Based on present R.775(i)(4). We feel this is useful, though incorporation could probably be done even if the rule were not included.

PARTIES UNDER DISABILITY

49.08 A party under a disability may make, withdraw and accept an offer to settle, but no acceptance of an offer made by him and no acceptance by him of an offer made by another party is binding on the party until the settlement has been approved as provided in rule 7.07.

49.08

- Williston 49.08(2), L.R. Working Group. Both Doug Coe and L. Perry raised questions as to whether the Williston rule adequately and clearly dealt with this subject. Does this separate and clearly headed rule do the job?

(2) Where the accepted offer to settle is the settlement or compromise of a claim made by or on behalf of a person under disability, the provisions of paragraph (1) shall not apply until the settlement or compromise has been approved as provided in Rule 7.07.

FAILURE TO COMPLY WITH ACCEPTED OFFER

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may make a motion to the court,

(a) for judgment in the terms of the accepted offer; or

(b) where the defaulting party is a plaintiff, to have his proceeding dismissed or, where the defaulting party is a defendant, to have his defence to the proceeding struck out.

COSTS CONSEQUENCES OF FAILURE TO ACCEPTPlaintiff's Offer

49.10 (1) Where an offer to settle made by a plaintiff at least seven days before the trial or hearing remained open until the commencement of the trial or hearing and was not accepted by the defendant, and the plaintiff obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to his party and party costs to the date of the service of the offer to settle and his solicitor and client costs thereafter, unless otherwise ordered.

Defendant's Offer

(2) Where an offer to settle made by a defendant at least seven days before the trial or hearing offer remained open until the commencement of the trial or hearing, and was not accepted by the plaintiff, and the plaintiff fails to obtain a judgment more favourable than the terms of the offer to settle, the plaintiff is entitled to his party and party costs to the date of service of the offer and the defendant is entitled to his party and party costs from the date of service of the offer, unless otherwise ordered.

49.09

- Williston 49.08 (1), L.R.

- Working Group. "To the court" would allow (indeed in Toronto it would require) the notice to be to a master. This is probably alright re (b), but what of (a)?

49.10

Williston 49.09, L.R., new heading.

10 days, reduced to 7 (see revised rule 49.03).

We recommend against the inclusion of the words in square brackets (see discussion at the beginning of this rule).

Working Group. The Hamilton Law Association (and many others) have criticized this rule as being unfair in providing differential cost consequences for plaintiffs (solicitor and client) and defendants (party and party). We disagree: (a) the differential costs formula are necessary to make the rule work - to provide the necessary incentive to a plaintiff to make an offer and to a defendant to accept the offer, and moreover (b) the differential is not unfair.

(a) The criticism overlooks the fact that a successful plaintiff, even

49.08 Effect of Acceptance

(1) Where any party to an accepted offer to settle fails to comply with the terms thereof, the other party may, subject to the provisions of paragraph (2), apply to the court,

(a) for judgment in the terms of the accepted offer; or

(b) where the defaulting party is a plaintiff, to have his proceeding dismissed or, where the defaulting party is a defendant, to have his defence to the proceeding struck out.

49.09 Effect of Failure to Accept

(1) Where an offer to settle was made by a plaintiff at least 10 days before the day on which the trial or hearing of the proceeding commenced and the offer has not been revoked, a plaintiff who obtains a judgment as favourable, or more favourable, than the terms of the offer to settle, shall be entitled to his party and party costs to the date of the service of the offer to settle and his solicitor and client costs thereafter, unless otherwise ordered.

(2) Where an offer to settle was made by a defendant at least 10 days before the day on which the trial or hearing of the proceeding commenced and the offer has not been revoked, a plaintiff who fails to obtain a judgment more favourable than the terms of the offer to settle shall only be entitled to his party and party costs to the date of the service of the offer to settle and the defendant shall be entitled to his party and party costs from the date of such service, unless otherwise ordered.

without having made an offer to settle, will normally recover his party and party costs. Hence, unless he will by making a realistic offer to settle do better than recover his party and party costs, there is no incentive for him to make an offer. More importantly, unless by refusing the offer a defendant will have to pay more than party and party costs there is no incentive for a defendant to accept the offer (since if the plaintiff is successful he will have to pay the plaintiff's party and party costs anyway).

(b) Nor is the rule unfair to defendants since they will still have the upper hand in negotiations - the cost consequence rules allow a defendant to exert more pressure on the plaintiff than vice-versa. Assume a situation where the final party and party costs for each party are \$6,000, divided into \$3,000 pre-trial and pre-offer costs and \$3,000 for trial. Assume also that the \$3,000 party and party costs for trial would tax on a solicitor and client basis at \$5,000.

If the plaintiff makes an offer which is refused by the defendant and he does as well or better at trial, the plaintiff will get by way of costs \$3,000 (the pre-offer party and party costs) and \$5,000 (solicitor and client at trial) = \$8,000. This gives him \$2,000 more than if he had never made the offer.

Contrast the situation of a defendant who makes a "successful" offer. He

will have to pay the plaintiff's pre-offer costs (\$3,000) and will get his own trial costs (\$3,000) these two figures cancel out. But if the defendant had never made an offer he would have had to pay \$6,000 by way of party and party costs, and therefore he is \$6,000 better off as a result of the offer and the rule.

In short, the rule (even though it provides for solicitor and client costs against the defendant) in terms of bargaining power still favours the defendant.

49.11

Williston 49.10, L.R.

Working Group. This rule is necessary but the reason why it is necessary was not readily apparent from Williston 49.10. The revised rule attempts to make the purpose clearer.

The Williston rule was never intended to stop one defendant settling with the plaintiff, or vice-versa, and hence words have been added to the revised rule to make this clear. What the rule is intended to do is to stop the "automatic" cost consequences applying to such partial settlements where (a) there are rights to contribution between the defendants and (b) the plaintiff has a right to execute for the whole of his judgment against any defendant beyond that defendant's proportionate

MULTIPLE DEFENDANTS

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by rule 49.10 do not apply to an offer to settle unless,

- (a) in the case of an offer made by the plaintiff, the offer is made to all such defendants, and is an offer to settle the claim as against all such defendants; or
- (b) in the case of an offer made to the plaintiff, the offer is made by all such defendants and is an offer to settle the claim against all such defendants and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer.

49.10 Multiple Defendants

Where two or more defendants are jointly, or jointly and severally, liable to the plaintiff in respect of any particular claim or claims, the cost consequences prescribed by Rule 49.09 shall not apply to an offer to settle, unless,

- (a) in the case of an offer made by the plaintiff, the offer is made to all such defendants, and is an offer to settle such claim or claims as against all such defendants; or
- (b) in the case of an offer made to the plaintiff, the offer is made by all such defendants and is an offer to settle such claim or claims against all such defendants and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer.

liability e.g. in the Negligence Act situations. In an attempt to make this purpose clear the words "between whom rights to contribution and indemnity may exist" have been added.

Re 49.11(a). A plaintiff must make his offer to all defendants (to get the cost consequences) to avoid a situation where he offers to settle with D2 for \$30,000 (which is more than D2's adjudged share). In such a case automatic cost consequences against D2 would be unfair, because the plaintiff cannot release D1's claim for contribution over against D2 and D2 may have to stay in the action to keep down the global assessment and thus his ultimate liability to contribute to D1.

Re 49.11(b). The defendants (in order to get the automatic cost consequences) must all join together in an offer to the plaintiff, because where each is severally liable to the plaintiff, the plaintiff is entitled not just to say \$30,000 from D2 (i.e. his proportionate share) but also to execute against D2, if necessary, for the total amount against all defendants e.g. \$100,000.

Where D2 is ready to make a reasonable offer to settle for his proportionate share, but D1 will not join in a joint offer, D2 can obtain relief by making an offer to contribute under 49.12.

OFFER TO CONTRIBUTE

49.12 (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any such defendant may make an offer in writing to any other such defendant to contribute toward a settlement of the claim.

(2) The court may take an offer to contribute into account in determining whether another defendant should be ordered to pay the costs of the defendant who made the offer or to indemnify the defendant who made the offer for any costs he is liable to pay to the plaintiff.

(3) Rules 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle.

49.12

- Williston 49.12, relocated and L.R.

- Sub-rule (1), L.R.

- Sub-rule (2), new. Working Group. We feel it is useful to spell out, albeit in general terms, how the offer to contribute may be relevant to the allocation of costs.

- Sub-rule (3), cross-references changed.

49.12 Offer to Contribute

(1) Where two or more defendants are jointly, or jointly and severally liable to the plaintiff in respect of any particular claim or claims, any one of such defendants may make an offer in writing to any other such defendant to contribute toward a settlement of such claim or claims.

(2) The provisions of Rules 49.05 and 49.11 shall apply to an offer to contribute as if it were an offer to settle.

DISCRETION OF COURT

[49.13 Notwithstanding rules 49.01 to 49.12, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served and the terms of the offer.]

49.13

Williston 49.11, L.R.

Working Group. We raise the question of whether it is wise to include this provision at all? Under the Williston scheme it was, in a sense, essential because all revoked - withdrawn offers were excluded from the operation of Williston 49.09 - the "automatic" cost consequences rule. This is not so under the revised rules we recommend (see discussion at beginning of this Rule and revised rule 49.10).

What would be its purpose in the revised rule? Its major purpose would be to allow (indeed invite) the court to give cost consequences to offers which are denied automatic cost consequences by revised rule 49.10 i.e. offers made less than 7 days before trial or during the trial. We do not believe the court should be invited by a rule to do so. If 49.13 were deleted the court would probably not be forbidden to give any late offer some consideration re costs, but what purpose does it serve to invite the court to do so? We recommend deletion.

APPLICATION TO COUNTERCLAIMS, CROSS-CLAIMS
OR THIRD PARTY CLAIMS

49.14 Rule 49 applies, with necessary modifications, to counterclaims, cross-claims and third party claims.

49.14

- Williston 49.13, L.R.

49.11 Discretion of Court

Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served and the terms thereof.

49.13 Application to Counterclaims, Cross-Claims or
Third Party Claims

The provisions of this rule shall apply, with any necessary modification, to any counterclaim, cross-claim or third party claim.

RULE 50 PRE-TRIAL CONFERENCE

WHERE AVAILABLE

50.01 Where a proceeding has been set down for trial or hearing, a judge may, at the request of a party or on his own initiative, direct the solicitors for the parties, either with or without the parties, and any party not represented by a solicitor, to appear before a judge for a pre-trial conference to consider,

- (a) whether it is possible to settle any or all of the issues in the proceedings;
- (b) the simplification of the issues;
- (c) the possibility of obtaining admissions that may facilitate the trial or hearing;
- (d) the question of liability;
- (e) the amount of damages, where damages are claimed;
- (f) the estimated duration of the trial or hearing;
- (g) the advisability of having the court appoint an expert;
- (h) the advisability of obtaining a fixed date for the trial or hearing;
- (i) the advisability of directing a reference; and
- (j) any other matter that may assist in the just, least expensive and most expeditious disposition of the proceeding.

RULE 50 PRE-TRIAL CONFERENCE

50.01

- L.R.
- Since parties do not obtain a pre-trial conference by motion, the word "request" is used.
- Doug Coe was concerned that Williston 50.01 did not take into account the procedure in the County Court in York where all cases are pre-tried as a matter of course. The revised rule says a judge may direct the solicitor etc. to appear before a "judge of the court". This would cover a general direction by the Senior Judge that all cases be pre-tried.
- Clause (a)- since a major purpose of pre-trial conferences in Ontario is to explore the prospect of settlement why should not the rule state this? If (a) is included clauses (d) and (e) might be deleted.
- Clause (b) - Doug Coe pointed out that in his court all cases are given fixed trial dates (and this would occur before the pre-trial conference Working Group. Not all clauses in 50.01 will be appropriate for all courts or all cases so is a specific qualification or deletion really necessary here?
- Insurance Bureau of Canada suggested that clause (h) be qualified to exclude considerations of insurance coverage. Working Group. Since the revised rule will make insurance

RULE 50 PRE-TRIAL CONFERENCE

50.01 Where Available

Where a proceeding has been set down for trial or hearing, a judge may, on the application of any party, or on his own motion, direct the solicitors for the parties, either with or without the parties, or any party not represented by a solicitor, to appear before him for a pre-trial conference to consider,

- (a) the simplification of the issues;
- (b) the possibility of obtaining admissions that may facilitate the trial or hearing;
- (c) the quantum of damages, where damages are claimed;
- (d) the estimated duration of the trial or hearing;
- (e) the advisability of having the court appoint an expert;
- (f) the advisability of obtaining a fixed date for the trial or hearing;
- (g) the advisability of directing a reference; and
- (h) any other matter that may assist in the just, least expensive and most expeditious disposition of the proceeding on its merits.

MEMORANDUM OR ORDER

50.02 (1) At the conclusion of the conference, counsel may sign a memorandum reciting the results of the conference and the judge may make an order giving such directions as he considers necessary or advisable, and the memorandum or order binds the parties, but the judge at the trial or hearing may modify the order as he considers just.

(2) A copy of a memorandum or order under subrule (1) shall be attached to the trial record.

coverage discoverable we see no reason for any such qualification given what we assume is the implicit underpinning of the whole rule i.e. that apart from what is endorsed on the record or contained in the memorandum referred to in 50.02, all discussions at the pre-trial conference are confidential and the judge undertakes not to disclose to anyone (and particularly his fellow judges) what was discussed. If there is any question as to this we believe the rule should specifically so state. Should such a provision as to confidentiality be included in the rule in any event?

50.02

- L.R.

- As D. Coe pointed out this rule should use the term "judge" not "court" and the provision for attaching the memorandum or order to the trial record (which was in the Williston Rule in rule 4.09(2) Trial Record) should be included in this rule.

50.02 Memorandum or Order

At the conclusion of the conference, counsel may sign a memorandum reciting the results of the conference and the court may make an order giving such directions as it considers necessary or advisable, and any such memorandum or order shall bind the parties, provided that the judge at the trial or hearing may modify the order as he deems just.

PRE-TRIAL JUDGE CANNOT BE TRIAL JUDGE

50.03 (1) A judge does not become seized of the proceeding by presiding at the pre-trial conference and is [^] disqualified from presiding at the trial or hearing except [by consent of the parties or] as provided by subrules (2) and (3).

50.03

- L.R., substantive change.
- D. Coe raised the question why the pre-trial judge should not be permitted to try the case if the parties consent?

This matter was debated at great length during the Williston Committee deliberations. Ultimately it was decided not to permit it. Mr. Justice Cory was strongly opposed to permitting the parties to consent to the pre-trial judge trying the case. He feared that what it would lead to were situations where one counsel (often the senior counsel) would indicate that he would have no objection to a pre-trial judge trying the case, and then the other counsel (too often junior and inexperienced) would feel pressured into consenting to the pre-trial judge presiding at trial. Given that full and open discussion of settlement is the subject of most Ontario pre-trial conferences, a trial before the pre-trial judge will usually be quite inappropriate. Also it needs to be kept in mind that any significant dilution of the general principle (pre-trial judge not to be the trial judge) will lead to one, or both, of two undesirable consequences: (a) the refusal of counsel to be frank in settlement discussions at the pre-trial for fear the judge may become the trial judge, or (b) trials before judges who do not have the impartiality we

50.03 Pre-Trial Judge Cannot be Trial Judge

A judge does not become seized of the proceeding by presiding at the pre-trial conference, but he is thereafter disqualified from presiding at the trial or hearing unless otherwise directed by the Chief Justice of the High Court.

(2) Where an order has been made under rule 37.13 designating a judge to hear all motions in a proceeding or proceedings and the judge has conducted a pre-trial conference, the judge may preside at the trial or hearing on consent of the parties.

expect of them because they have obtained information at the pre-trial which would not be admissible in court.

The fact is that we cannot have it both ways. While pre-trials are used as a vehicle for judicial mediation towards settlement, the pre-trial judge should not be, and cannot properly be the trial judge.

The exception in Williston 50.03 re a direction from the Chief Justice, etc. was primarily intended to deal with cases where under Williston 37.1 all pre-trial motions have been heard by a particular judge. In such cases it may be appropriate for that judge to hold a non-settlement, trial oriented, pre-trial conference. The idea was that where this occurred he could be directed by the Chief Justice to try the case. Since the purpose of this rule was quite unapparent, we have, in the revised rule, provided that in such cases on consent of the parties he may try the case. (Should it be qualified to say "if settlement has not been discussed"?)

(3) Where a pre-trial conference in a divorce action has resolved all the issues, the judge who conducted the pre-trial conference may preside at the trial on consent of the parties.

Divorce cases present (or can present) a different problem which we believe can and should be dealt with quite separately from the general question of whether on consent a pre-trial judge can try the case. In a non-divorce case where all issues are resolved the pre-trial judge can grant a consent judgment. Not so in a divorce case, because the Act requires a trial. Where at a pre-trial conference a divorce case all issues are resolved then, of course, on consent the trial judge should be able to conduct the trial.

DOCUMENTS TO BE MADE AVAILABLE

50.04 All documents intended to be used at the trial or hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as medical reports and reports of experts, shall be made available to the pre-trial judge.

COSTS OF PRE-TRIAL CONFERENCE

50.05 The pre-trial judge may make an order as to the costs of the pre-trial conference but, in the absence of an order, the costs shall be costs in the cause.

50.05

- L.R.

- D. Coe suggested this rule should expressly refer to whether the parties have complied with 50.04 as a relevant consideration on the issue of costs. Working Group. While this is obviously a relevant consideration, we felt that to do so might give undue weight to this one fact. Should it be included?

50.04 Documents to be Made Available

All documents intended to be used at the trial or hearing and which may be of assistance in achieving the purposes of a pre-trial conference, such as medical reports and reports of experts, shall be made available to the pre-trial judge.

50.05 Costs of Pre-Trial Conference

The pre-trial judge may make an order as to the costs of the pre-trial conference but, in the absence of such an order, the costs thereof shall be costs in the cause.

CONFERENCE BEFORE TRIAL JUDGE

50.06 Rule 50.03 does not prevent a judge before whom a proceeding has been called for trial or hearing from holding such a conference either before or during the trial or hearing without disqualifying himself from presiding at the trial or hearing, except where, unless all parties (expressly) consent, there is discussion as to,

- (a) the discharge of the jury;
- (b) the settlement of liability; or
- (c) the amount of damages.

50.06

- L.R.

- Both D. Coe and the Hamilton Law Association raised the question of whether Rule 50.06 was necessary at all. Working Group. We favour the retention of the rule.

The first part of the rule is necessary (as is the present R.244(6)) to make it clear that day of trial or in trial conferences do not carry with them the automatic disqualification of the judge to try the case.

As to the second part of the rule, we believe it fairly states what the law is and should be. In the vast majority of cases counsel welcome the assistance of judges in bringing about settlements and will readily consent to such conferences. However there are cases where it may be quite appropriate for counsel to refuse to consent. Given the frequency of such conferences today, we feel that it is useful for the rules to state the right of counsel to refuse to consent and the fact that the judge may only conduct such discussions with the consent of all parties.

50.06 Proviso

Nothing in this rule shall prevent a judge before whom a proceeding has been called for trial or hearing from holding such a conference either before or during the trial or hearing without disqualifying himself from presiding at the trial or hearing provided, however, that, unless expressly consented to by all parties, there shall be no discussion as to,

- (a) the discharge of the jury;
- (b) the settlement of liability; or
- (c) the quantum of damages.

RULE 51 ADMISSIONSRULE 51 ADMISSIONS

RULE 51 REQUEST FOR ADMISSION

- Working Group. The Williston Committee dealt with admissions in two separate rules.

Rule 31.10 (in the Discovery of Documents rule) provided a procedure for a notice to admit re documents. We are not happy with the location of this rule in the discovery of documents rule: while it might be used prior to discovery it is just as likely to be used in the eve of trial. When so used the discovery of documents rule would be an odd place to find it.

Williston Rule 51 deals with requests for admissions of "any facts" - this could include documents but the rule was not specifically geared to this.

Since the two procedures are so similar - both in purpose and mechanics - there does not seem to be any need to deal with them separately in separate rules. One procedure does for both.

The B.C., Nova Scotia and U.K. rules each have a rule called "Admissions" which deals comprehensively with notice to admit facts or documents, the withdrawal of admissions and a motion for judgment on admissions. We favour this approach and revised rule 51 (which is modelled on the provisions in the above jurisdictions) is our proposal. If the rules are to be renumbered we favour locating it immediately after the Medical Examination Rule at the end of the Discovery Section.

DEFINITION

51.01 In Rule 51, "authenticity" includes the fact that a document was sent or received and that, where it is said to be a copy, it is a true copy of the original.

NOTICE TO ADMIT FACTS OR DOCUMENTS

51.02 (1) A party may at any time, by serving a notice to admit (Form 51A), request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.

(2) Where practicable, a copy of any document mentioned in the notice to admit shall be served with the notice, unless a copy is already in the possession of the other party.

51.02(1)

- cf. Williston 31.10(1), 51.01
- Williston 31.10 did not limit the admission re documents to the proceeding only.

51.02(2)

- Williston 31.10(2), L.R.

31.10 Notice to Admit Authenticity, Dispatch or Receipt of Specified Documents

(1) Any party to an action may, at any time, require any other party thereto to admit the authenticity or dispatch or receipt of any particular document by serving upon him a notice to that effect.

51.01 Admission of Fact

Any party to an action may, at least 20 days before the trial, serve on any adverse party a request for admission in writing of the truth of any relevant facts specified in the request.

31.10 (2) Where practicable, a copy of any such document shall be served with the notice, unless it appears from the Affidavit of Documents, if any, of the party to be served, that a copy thereof is in his possession.

EFFECT OF NOTICE TO ADMIT

51.03 Unless the court orders otherwise, the truth of a fact or the authenticity of a document mentioned in the notice to admit shall be deemed to be admitted, for the purposes of the proceeding only, unless within twenty days the party receiving the notice serves on the party giving the notice, a notice of refusal to admit (Form 51B) that,

- (a) specifically denies the truth of the fact or the authenticity of the document;
- (b) sets out in detail the reasons why he cannot make the admission; or
- (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and set out in detail the reasons for the refusal.

51.03

- cf. Williston 31.10(3) and (4) and 51.02 and 51.03.
- revised rule requires a response within 20 days or a deemed admission follows (cf. 10 days and 30 days).
- Williston 31.10 was silent as to the nature of the required response. Williston 51.02 required "reasons" to be given for a refusal. Doug Coe questioned whether if it was desirable to require a party to give reasons at all. He points out that the reason for refusing to admit might be the need to force the other party to call a witness who may then be cross-examined with regard to other issues. The revised rule follows B.C. and the U.S. rules and requires either a specific denial or detailed reasons. (Nova Scotia requires a specific denial and reasons why the admission cannot be made). Which is the best approach?

The advantage of requiring reasons is that otherwise the practice will likely develop of preparing standard form refusals to admit. These would be used routinely by counsel without reviewing the file or directing their minds to the issue raised, thereby thwarting the purpose of the rule.

31.10 (3) Unless the party upon whom such notice has been served, within 30 days thereafter, serves notice that he does not admit the authenticity or dispatch or receipt thereof, and that he requires it to be proved at the trial, he shall be deemed to admit that any such document described in the Affidavit of Documents,

- (a) as an original document, was printed, written, signed or executed as it purports to have been;
- (b) as a copy, is a true copy;
- (c) as a copy of a letter, telegram, cablegram or telecommunication, the original was dispatched to the addressee or received by him, as the case may be.

(4) Where the authenticity or dispatch or receipt of any document is so admitted by any party, he may not thereafter put in issue the authenticity or dispatch or receipt of that document without leave of the court.

51.02 Effect of Request

Within 10 days after service of the request, the party to whom the request is directed shall serve upon the party requesting the admission a written answer or objection thereto. If objection is made, the reasons therefor shall be stated.

51.03 Effect of Admission

(1) Any fact admitted under this rule is conclusively established unless the court permits withdrawal or amendment of the admission.

(2) The admission of any fact under this rule may be used only in the action in respect of which it is made.

COSTS ON REFUSAL TO ADMIT

51.04 Where a party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document, the court may order the party to pay the costs of proving the truth of the fact or the authenticity of the document and may award as a penalty such additional costs, or deprive a party of such costs, as are just.

51.04

- cf. Williston 51.04. Williston 31.10 attached no cost consequence to refusing to admit documents.
- 57.04 is taken from the B.C. rules. Williston required a trial judge to take a refusal to admit into accounting considering costs. Revised rule does not but authorizes or suggests a broader range of costs orders than Williston 51.04.
- D. Coe suggested that this Rule might provide for consequences in costs against a party who leads evidence at trial to prove a fact which would have been admitted had a notice to admit been served. He referred to the case in which a number of witnesses are called to prove a fact, after which the other party asserts that the fact was never in issue, and that he would have admitted it had he simply been asked to do so.

While the Working Group agrees that the Rule might ideally provide such an incentive to encourage its use where appropriate, we see no need to add a provision to meet the problem which has been described. In the first place, costs may be ordered against a party who sits silently while extensive evidence is led to establish a fact which he knows not to be in issue. Secondly, such undisputed matters will ordinarily be identified in the course of discovery or pre-trial conference. Finally, the complex drafting required to express the provision presents a difficulty which exceeds the advantage of including it. For these reasons, the Working Group recommends that the amendment not be made.

51.04 Effect of Refusal or Failure

Where any party refuses or fails to admit any fact in compliance with a request under this rule, and such fact is subsequently proved at the trial, the trial judge shall take such refusal or failure into account in exercising his discretion as to costs.

WITHDRAWAL OF ADMISSION

51.05 An admission made in response to a notice to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

JUDGMENT ON ADMISSION OF FACTS OR DOCUMENTS

51.06 Where an admission of the truth of a fact or the authenticity of a document is made by a party,

- (a) in his pleading;
- (b) on his examination for discovery;
- (c) in an affidavit or cross-examination on an affidavit; or
- (d) in response to a notice to admit,

any other party may make a motion to a judge for such judgment or order as he may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may give such judgment or make such order as is just.

51.05

- new, based on B.C., N.S. and U.K.

57.06

- Williston 23.01(1)(c), L.R.
- Working Group. We feel it fits better here than in Rule 23, because often no real question of law is involved but rather the nature and scope of the admissions made.
- revised rule adds admissions in affidavits or on cross-examination.
- we have required the motion to be to a judge, and have excluded the master's jurisdiction. O.K.?

23.01 Where Available

(1) The plaintiff or a defendant may, at any time before the action is set down for trial, apply to a judge,

(c) for judgment upon any admission of fact in the pleadings, in the examination of any other party or in answer to a Notice to Admit.

RULE 52 TAKING EVIDENCE BEFORE TRIAL

[Note re Rules 52 and 53. The Working Group has reversed the order of the rules on Expert Witness and Taking Evidence Before Trial for the following reason: if the circumstances under which a witness may be examined before trial are broadened - as proposed in revised rule 52.01 - then we suggest there is no need for a separate rule re the pretrial examination of experts: they could be examined under revised rule 52. In short, duplication would be avoided. However, in drafting revised rule 53 (Expert Witness) the Working Group has retained the provisions for the examination of such witnesses before trial. If our proposal (above) is accepted we would propose that 53.02 be deleted.]

RULE 52 TAKING EVIDENCE BEFORE TRIAL

WHERE AVAILABLE

52.01(1) By consent of the parties or by order of the court, a person may be examined on oath before trial, for the purpose of having a transcript or recording of his testimony available to be tendered as evidence at the trial.

(2) In exercising its discretion to order an examination under subrule (1), the court shall take into account,

- (a) the convenience of the person sought to be examined;
- (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness, or absence;
- (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial; and
- (d) the expense of bringing the person to the trial.

52.01

D. Coe queried why the circumstances in which an expert's evidence could be ordered to be taken before trial were broader than those governing non-expert witnesses. Working Group: We suggest that the same standards should apply to both types of witnesses. Hence, for the Subcommittee's consideration we have redrafted 52.01 to broaden the circumstances in which any witness may be examined before trial (52.01 is copied from B.C. Rule 38).

PREPARATION FOR TRIAL

RULE 53 TAKING EVIDENCE PRIOR TO TRIAL

53.01 Where Available

(1) By order of the court, or by consent of the parties, a person may be examined on oath before trial for the purpose of having a deposition of his testimony available to tender as evidence at the trial.

(2) An order may be made under paragraph (1) where the court is satisfied that material evidence may be obtained from a person,

- (a) who may not be able to attend or testify at the trial by reason of illness, age or other infirmity;
- (b) whose attendance at the trial may not be compelled by reason of his absence from Ontario; or
- (c) who resides out of Ontario and it is impossible to procure his attendance or impractical to do so by reason of the expense involved.

PROCEDURE

52.02(1) Rule 33, except rule 33.14 (objections), applies to the examination of a witness under rule 52.01, unless otherwise ordered or provided by this rule.

(2) A witness examined under rule 52.01 may be examined, cross-examined and re-examined in the same manner as a witness at trial.

(3) Where a question is objected to, the witness shall answer the question unless the objection is made on the ground of privilege, and the answer shall be transcribed or recorded separately and shall not be used at the trial unless the presiding judge rules that the question is proper.

(4) An order or consent for the examination of a witness under rule 52.01 may provide that the examination be recorded by videotape or other similar means either in addition to or in substitution for a typewritten transcript.

52.02 (1)

- Redrafted to exclude the application of 33.14 (Objections) since different principles apply re objections where it is trial evidence of a witness that is being taken (see revised rule 52.02(3)). D. Coe raised the question of whether the protection order provision (33.15) should apply to evidence taken for trial. Working Group. Though it will likely be rarely invoked we feel that a protection order should be available to deal with any real abuse on such examinations.

52.02 (2)

- L.R.

52.02 (3)

- New. Spells out (in lieu of 33.14) the procedure to be followed on this type of examination where objections are made.

52.02 (4)

- L.R.

53.02 Procedure

(1) Unless otherwise ordered or provided by this rule, the procedure prescribed by Rule 33 shall apply to the examination of any witness under this rule.

(2) On the examination of a witness under this rule, he may be examined, cross-examined and re-examined in the same manner as a witness at trial.

(3) An order or consent for the examination of a witness under this rule may provide that the examination be recorded by videotape or other similar means either in addition to or in substitution for a typewritten transcript.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

MILLISTON'S PROPOSED RULES **331** **52.03**

EXAMINATIONS OUTSIDE ONTARIO

52.03(1) Where an order is made under rule 52.01 for the examination of a witness outside Ontario, the order shall provide for,

- (a) the issuance of a commission (Form 53A) authorizing the taking of such evidence before a named commissioner; and
- (b) if requested, the issuance of a letter of request (Form 53B) directed to the appropriate authority in the jurisdiction in which the witness is to be found, requesting the issuance of such process as may be necessary to compel the witness, or any other witness who may be examined under this rule, to attend and submit to examination before the commissioner.

(2) The examination of a witness outside Ontario shall take the form of oral questions and answers, unless some other form of examination is required by the order or by the law of the place where the examination is conducted.

(3) At the conclusion of the examination of a witness under rule 52.01, the commissioner shall, on the consent of all parties, allow any other witness who is to be found in the same jurisdiction to be examined before him.

52.03

- L.R.

53.03 Examination Out of Ontario

(1) Where an order is made under this rule for the examination of a witness out of Ontario, the order shall provide for,

- (a) the issuance of a Commission (Form 53A) authorizing the taking of such evidence before the Commissioner therein named; and, if requested,
- (b) the issuance of a Letter of Request (Form 53B) directed to the appropriate authority in the jurisdiction in which the witness is to be found, requesting the issuance of such process as may be necessary to compel that witness, or any other witness who may be examined under this rule, to attend and submit to examination before the Commissioner.

(2) The examination of a witness out of Ontario shall take the form of oral questions and answers, unless some other form of examination is required by the order or by the law of the place where the examination is conducted.

(3) At the conclusion of the examination of a witness ordered to be examined under this rule, the Commissioner shall, on the consent of all parties, allow any other witness who is to be found in the same jurisdiction to be examined before him.

USE AT TRIAL

52.04 (1) A party who has examined a witness under rule 52.01 or any other party may use at the trial the transcript or recording of the examination as the evidence of the witness, unless the court orders otherwise on the ground that the witness ought to give his evidence orally at the trial or for any other sufficient reason.

(2) Where the evidence of a witness has been taken under rule 52.01, he shall not be called to give evidence at the trial, except with leave of the trial judge.

(3) Use of the evidence of a witness examined under rule 52.01 is subject to any ruling by the presiding judge as to the admissibility of the evidence.

(4) The transcript or recording may be filed with the court at the trial and need not be read or played at the trial unless the presiding judge requires it.

52.04

- L.R. and rule expanded. The rule has been expanded to give a guideline as to when the court might order that a witness attend in person even though his evidence has been taken before hand. Subrule (3) makes it clear that the evidence of the witness must be admissible under the rules of evidence. The Working Group felt that this was more helpful than the phrase, "saving all just exceptions." Subrule (4) is an attempt to save court time where it is unnecessary to read in the transcript or play back the tape.

53.04 Use at Trial

(1) A deposition taken under this rule shall be admissible at trial, unless the court otherwise orders, as the evidence of the witness so examined, saving all just exceptions, and may be tendered in evidence by any party to the action.

(2) Where the evidence of a witness has been taken pursuant to this rule, he shall not be called to give evidence at the trial, except with leave of the trial judge.

RULE 53 EXPERT WITNESS

CONDITION PRECEDENT TO CALLING EXPERT WITNESS AT TRIAL

53.01(1) A party who intends to call an expert witness at trial shall, not less than ten days before the commencement of the trial, serve on every other party to the action a copy of a report, signed by the expert, setting out his name, address and qualifications and the substance of his proposed testimony.

(2) Where the expert is a medical or dental practitioner, the party shall serve the report with the notice (Form 53A) required by section 52 of the Evidence Act.

(3) An expert witness may not testify unless,

(a) the party calling him has complied with this rule; or

(b) the trial judge grants leave.

- The form proposed is intended to overcome a problem now encountered under section 52 of the Evidence Act. Today a party may not call a doctor or use a report in evidence unless "seven days notice" is given to all other parties. By that notice, the party does not have to indicate whether he will call the doctor or use the report without calling the doctor. This can place the opposite party in a difficult situation. We propose that in the notice the party should have to indicate whether, in the event that he calls the doctor's evidence, he will do so by using the report or by calling the doctor in person.

RULE 53 EXPERT WITNESS

53.01(1)

- L.R.

- In Circosta v Lilly [1967] 1 O.R. 398 the Court of Appeal held a provision similar to this (requiring pre-trial disclosure of medical reports) to be ultra vires as dealing with substantive law, not practice and procedure. In light of Circosta is 53.01 adequately supported by the rule making power in the Judicature Act s.40? See s.40, particularly ss.(2)(k),(t) & (f). Clause (f) is what the Williston Committee intended as the empowering provision for this rule. Is there any problem that, because of its location (as rule 53.01, under the heading of "Preparation before Trial"), it may not be characterized as a discovery rule?

53.01(2)

- New. The Attorney General has directed that Williston 52.03 be deleted and the matters therein dealt with appear, as at present, in the Evidence Act (now section 52, which needs and will receive attention). This provision is designed to tie rule 53 in with the Evidence Act provision for medical reports.

PREPARATION FOR TRIAL

RULE 52 EXPERT WITNESS

52.01 Condition Precedent to Calling Expert Witness at Trial

(1) Any party intending to call an expert witness at trial shall, not less than 10 days prior to the commencement of the trial, serve upon every other party to the action, a copy of a report, signed by the expert, setting out his name, address and qualifications and the substance of his proposed testimony.

(2) Unless paragraph (1) of this sub-rule has been complied with, no expert witness may testify without leave of the trial judge.

52.03 Medical Expert

(1) Subject to compliance with Rule 52.01, a medical report prepared and signed by a medical or dental practitioner, licensed to practise in some part of Canada is, with leave of the court, admissible in evidence at trial, provided that at least 10 days notice of intention to introduce the report in evidence has been given to every other party.

(2) Where any such medical or dental practitioner has been required to attend and give oral evidence at or before trial and the court is of the opinion that his evidence could have been introduced as effectively by way of a medical report, the court may order the party who required the attendance of the medical or dental practitioner to pay the costs of his attendance.

EXAMINATION OF EXPERT WITNESS BEFORE TRIAL

53.02(1) Where, for any reason, it is impractical or inconvenient for an expert witness to attend the trial of an action, the party intending to call the witness may, with leave of the court or on the consent of all parties, examine the witness at his own expense before the trial for the purpose of taking his evidence for use at the trial.

(2) Before moving for leave to conduct an examination under subrule (1), the moving party shall comply with rule 53.01.

(3) Rule 33, except rule 33.14 (objections), applies to the examination of a witness under this rule, unless otherwise ordered or provided by this rule.

(4) A witness examined under this rule may be examined, cross-examined and re-examined in the same manner as a witness at trial.

(5) An order or consent for the examination of a witness under this rule may provide that the examination be recorded by videotape or other similar means either in addition to or in substitution for a typewritten transcript.

(6) Where the evidence has been transcribed, the party whose witness has been examined shall serve every party who attended or was represented on the examination with a copy of the transcript, free of charge.

53.02

- L.R. and expanded as in rule 52.04. If rules 52 and 53 are combined, most of rule 53.02 would disappear. The exception would be the provision in sub-rule 53.02(1) for the examination to be at the expense of the examining party and the requirement of compliance with rule 53.01 before a motion to examine an expert was made.

52.02 Examination of Expert Witness Before Trial

(1) Where, for any reason, it may be impractical or inconvenient for an expert witness to attend the trial of an action, the party intending to call that witness may, with leave of the court, or on the consent of all parties and at his own expense, examine that witness before the trial for the purpose of taking his evidence for use at the trial.

(2) Before applying to the court for leave to conduct an examination under this sub-rule, the applicant shall comply with the requirements of Rule 52.01.

(3) Unless otherwise ordered or provided by this rule, the procedure prescribed by Rule 33 shall apply to the examination of any witness under this sub-rule.

(4) On the examination of a witness under this sub-rule, he may be examined, cross-examined and re-examined in the same manner as a witness at trial.

(5) An order or consent for the examination of a witness under this sub-rule may provide that the examination be recorded by videotape or other similar means either in addition to or in substitution for a typewritten transcript.

(6) Where the evidence has been transcribed, the party whose witness has been so examined shall serve every party who attended, or was represented on the examination, with a copy of the transcript, free of charge.

(7) A party who has examined a witness under this rule or any other party may use at the trial the transcript or recording of the examination as the evidence of the witness, unless the court orders otherwise on the ground that the witness ought to give his evidence orally at the trial or for any other sufficient reason.

(8) Where the evidence of a witness has been taken [^] under ^{this} rule ~~33.02~~, he shall not be called to give evidence at the trial, except with leave of the trial judge. [^]

(9) Use of the evidence of a witness examined under this rule is subject to any ruling by the presiding judge as to the admissibility of the evidence.

(10) The transcript or recording may be filed with the court at the trial and need not be read or played at the trial unless the presiding judge requires it.

(7) A transcript or videotape or other similar recording of such evidence shall be admissible at the trial, unless the court otherwise orders, as the evidence of the expert witness so examined, saving all just exceptions, and may be tendered in evidence by any party to the action who attended, or was represented, on the examination.

(8) Where the evidence of an expert witness has been taken pursuant to the provisions of this sub-rule, he shall not be called to give evidence at the trial, except with leave of the trial judge, or where the trial judge has required his attendance at the trial.

TRIALS

RULE 54 TRIAL PROCEDURE

Failure to Attend at Trial

54.01(1) Where an action is called for trial and all of the parties fail to attend, the trial judge may strike the action off the list.

TRIALS

RULE 54 TRIAL PROCEDURE

54.01 Failure to Attend at Trial

(1) Where an action is called for trial and all of the parties fail to attend, the trial judge may strike the action off the list.

RULE 54 TRIAL PROCEDURE

54.01(1)

- This rule provides as a sanction, striking the case off the list. Rule 47.13 deals with restoring struck cases to the list and could be usefully redrafted (for clarity and accuracy) as follows:

Actions Struck Off List

- 47.13 Where an action is struck off the list,
- (a) it may be restored to a list for trial by leave of a judge in which case he shall determine the position of the action on the list; or
 - (b) it may be set down again for trial by the delivery of a new notice of trial.

(2) Where an action is called for trial and a party fails to attend, the trial judge may,

- (a) proceed with the trial in the absence of the party;
- (b) where the plaintiff attends and the defendant fails to attend, allow the plaintiff to prove his claim and dismiss the counterclaim, if any;
- (c) where the defendant attends and the plaintiff fails to attend, dismiss the claim and allow the defendant to prove his counterclaim, if any; or
- (d) make such other order as is just.

(3) A judge may set aside or vary, on such terms as are just, a judgment obtained against a party who failed to attend at the trial.

54.01(3)

- The Working Group was directed to take a look at the various provisions re setting aside judgments to see whether or not they could be made consistent. The Working Group has done this in consultation with the Chairman. For the reasons set out in the following memo, it is recommended that revised rule 54.01(3) (with its general power) be substituted for Williston 54.01(3) (with its detailed criteria for setting aside).

cont'd

(2) Where an action is called for trial and any party fails to attend, the trial judge may,

- (a) proceed with the trial in the absence of that party;
- (b) where the plaintiff attends and the defendant fails to attend, allow the plaintiff to prove his claim and dismiss the counterclaim, if any;
- (c) where the defendant attends and the plaintiff fails to attend, dismiss the claim and allow the defendant to prove his counterclaim, if any; or
- (d) make such other order as may seem just.

(3) Any judgment obtained against any party who failed to attend at the trial may be set aside by a judge on such terms as may seem just where the motion is brought without undue delay and the failure to attend is satisfactorily explained. Unless the failure to attend was through no fault of the applicant, he shall be required to satisfy the judge that there is a triable issue.

July 23rd, 1981.

MEMORANDUM TO: Sub-Committee on the New Rules

FROM: Working Group

RE: Setting aside Judgments and Orders obtained in default or where a party failed to attend or is not properly served, etc.

In the Williston rules (and in the Revised Rules to date) there are six different rules dealing with this subject. The rules are not uniform in their approach - some just give the court a general power to vary or set aside, others provide detailed criteria, others provide limited criteria.

The Sub-Committee agreed that all of these rules should be looked at to see whether a common formula should be developed for all of these rules or whether one or more standards are necessary. The rules dealing with the subject are the following:

- 21.03 - Setting aside noting of default (general, no criteria).
- 21.08 - Setting aside default judgment, whether signed or on motion or at trial (general, no criteria).
- 22.08 - Setting aside summary judgment (criteria - without undue delay, failure explained, court satisfied judgment ought to be set aside).
- 37.06 - Setting aside judgments and orders made on motion (must move promptly).
- 38.11 - Setting aside judgments granted on applications (must move promptly).
- 54.01(3) - Setting aside judgment at trial (criteria, similar to 22.08 but not identical).

The approach taken in 22.08 and 54.01(3) is, more or less, to codify the criteria developed under the present practice for setting aside such judgments, ie.

- moving without delay
- explaining failure to attend
- (usually) showing reasonable defence on the merits

The approach of setting out the practice through specified criteria could be carried through to each of the rules dealing with setting aside judgments and orders. It has the advantage of being much more informative for all readers of the rules. However there are drawbacks

- (a) it would make each of the setting aside rules very long
- (b) the criteria may not be accurate for every type of setting aside eg. default judgments (failure to move promptly may not be fatal if the defendant can show merits, and where plaintiff has proceeded improperly defendant may not have to show merits).

The present situation with six different rules most of which are expressed differently is somewhat misleading in that, for example, the spelling out of criteria in 22.08 and 54.01(3) seems to suggest that these criteria are not applicable under 21.03, 21.08, etc.

On balance we suggest that as was done under the new B.C. rules a common general formula be used in each of the six rules i.e.

"The court may set aside or vary a judgment ... on such terms as are just".

Adjournment of Trial

54.02 A judge may at any time postpone or adjourn a trial to such time and place, and on such terms, as are just.

Court Experts

54.03(1) On motion by any party, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.

54.02

- L.R.

54.03

- Working Group. This rule was included by the Williston Committee in lieu of present rule 267 (which permits the court to obtain the assistance of experts). The rule is influenced by similar rules in the U.K. and Nova Scotia. Two things are to be noted: (a) the expert is to be appointed only on the application of a party; and (b) the expert's role is to be a witness, not someone who sits with the judge.

54.03(1)

- Doug Coe notes the rule would permit the pretrial appointment of the expert by someone other than the trial judge. Working Group. This was intended and might be useful in some cases e.g. a medical malpractice case where a plaintiff is having difficulty hiring an expert but where there are doctors who are willing to testify if appointed by the court. Parties may even agree to settle on the basis of a report made by an "early appointed" court expert.

- Doug Coe raised the question of how the trial judge would deal with a court expert appointed by some other judge. Working Group. At the trial the role of the expert would be that of a witness so there should be little difficulty.

54.02 Adjournment of Trial

A judge may at any time postpone or adjourn a trial to such time and place, and upon such terms as may seem just.

54.03 Court Experts

(1) On the application of any party, a judge may, at any time, appoint one or more independent experts to inquire and report on any question of fact or opinion relevant to to any issue in the action.

(2) The court expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties.

(3) The order shall contain the instructions to be given to the court expert and the judge may, from time to time, [on motion by a party or on his own motion] make such further orders as he considers necessary to enable the court expert to carry out his instructions, including an order for the physical or mental examination of a party under section 00 of the Judicature Act or an order under Rule 35 (inspection of property).

(4) The judge may direct the court expert to make a further or supplementary report.

(5) A copy of the report of the court expert shall be sent to every party, and the original shall be filed [as evidence] at the trial of the action.

54.03(3)

- Williston 54.03(3) as drafted might have been interpreted as giving to a judge a broader power to order examinations of persons or property than he could have ordered on the motion of a party under Rules 35 and 36. The revised rule limits this power specifically, but it provides that the judge may so order on his own motion or on the motion of any party.

54.03(5)

- The purpose of Williston 54.03(5) was to make it clear that (a) the report was to be available to all parties and the court, and (b) that it has no higher status than any other evidence submitted to the court (ie. the experts opinions are to be evidential in nature (not "advisory") and the expert is to be subject to cross-examination). However, there are drafting problems.
- D. Coe pointed out that the requirement that it "shall be filed as evidence" gave the trial judge no discretion and he favoured adding the words "unless the court otherwise orders" (the same words that qualify the admission of commission evidence under Rules 52 and 53). This seems to be a good solution, but there are further problems.

cont'd

(2) The court expert shall be named by the judge and, where possible, shall be an expert agreed upon by the parties.

(3) The order shall contain the instructions to be given to the expert and the judge may, from time to time, make such further orders as he deems necessary to enable the court expert to carry out his instructions, including the examination of any party or property and the making of experiments and tests.

(4) The judge may direct the court expert to make a further supplementary report.

(5) A copy of the report of any expert appointed by the court shall be sent to each of the parties, and the original shall be filed as evidence at the trial of the action.

- The Williston rule, even with D. Coe's suggestion would make the report itself evidence. The only other expert's reports which are themselves evidence (as distinct from the expert's oral evidence) are medical reports pursuant to the Evidence Act. C. Perkins prefers that the revised rules simply say that the report "may be filed" and nothing more, leaving the use of the report to the law of evidence. (He prefers this approach because of the A.G.'s instruction that the rules are not to deal with admissibility of evidence, and because of uniform legislation problems.)
- Other alternatives would be
 - (a) to amend the Evidence Act to make such reports admissible, or
 - (b) to include in the rule making power in the Judicature Act a specific authority to make rules regarding the appointment of court experts and the use at trial of their reports. (A specific power re rules permitting court appointment of experts may be essential in any event since s.40(2)(t) of the new Judicature Act may have to be deleted because of the A.G.'s instruction re evidence.)

(6) Any party may, at the trial, cross-examine the court expert on his report.

>

(7) The remuneration of a court expert shall be fixed by the judge, and shall include a fee for his report and a proper sum for each day that he is required to attend at trial.

(8) The liability of the parties for payment of the remuneration of a court expert shall be determined by the judge.

(9) Where a motion by a party for the appointment of a court expert is opposed, the judge may, as a condition of making the appointment, require the party seeking the appointment to give such security for the remuneration of the court expert as is just.

WILLISTON 54.03(7)

- D. Coe suggests this be deleted as unnecessary as the matter is adequately dealt with by Evidence Act s.12. Working Group agrees.

(6) Any party may, at the trial, cross-examine the expert on his report.

(7) Where a court expert is appointed, any party may call one expert to give evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.

(8) The remuneration of a court expert shall be fixed by the judge, and shall include a fee for his report and a proper sum for each day that he is required to attend at trial.

(9) Where a court expert is appointed, the liability of the parties for the payment of his remuneration shall be determined by the judge.

(10) Where an application by any party for the appointment of a court expert is opposed, the judge may, as a condition of making the appointment, require the party applying for the appointment to give such security for the remuneration of the court expert as may seem just.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

WILLISTON'S PROPOSED RULES

Exhibits

54.04(1) Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in evidence and, where the person who produced it is not a party or his solicitor, the name of that person.

(2) At any time following the trial judgment, any interested person may require the registrar to return all or any of the exhibits on filing the consent of all parties represented at the trial.

54.04(1)

- D. Coe pointed out that this rule should make it clear that the name of the person from whose possession the exhibit came should only be relevant (or ascertainable) where it is produced in court by some one other than a solicitor or a party. The rule has been revised accordingly.

54.04(2)

- "Party" changed to "person" to permit the person from whose possession the exhibit came to get it back.

54.04 Exhibits

(1) Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in evidence and, where the person from whose possession it came is other than a party, the name and identity of that person.

(2) At any time following the trial judgment, any party may apply to the registrar for delivery of all or any of the exhibits upon filing the consent of all parties represented at the trial.

(3) Subject to subrule (2), the exhibits shall remain in the possession of the registrar,

- (a) until the time for taking an appeal to the Court of Appeal has expired; ^A
- (b) where an appeal is taken to the Court of Appeal and has been disposed of, until the time for taking an appeal to the Supreme Court of Canada has expired; or
- (c) where an appeal is taken to the Supreme Court of Canada, until it is disposed of.

(4) On the expiration of the time for appeal or on the disposition of the appeal, the registrar shall, unless otherwise ordered, return the exhibits to the respective parties or solicitors of record for the parties who put the exhibits in evidence at the trial. ^A

(3) Subject to the preceding paragraph, the exhibits shall remain in the custody or control of the registrar,

- (a) until the time for taking an appeal to the Court of Appeal has expired; or
- (b) where an appeal is taken to the Court of Appeal and has been disposed of, until the time for taking an appeal to the Supreme Court of Canada has expired; or
- (c) where an appeal is taken to the Supreme Court of Canada, until it is disposed of.

(4) Upon the expiration of the time for appeal or on the disposition of the appeal, the registrar shall, unless otherwise ordered, return the exhibits to the respective solicitors or record for the parties who put the exhibits in evidence at the trial and those solicitors shall return the exhibits to the persons from whose possession they came.

54.04 (4)

- D. Coe pointed out that this rule does not deal adequately with parties who act in person: the rule has been amended accordingly. He also asked why the registrar should not have to return exhibits to the possession of non-parties where it is known that they produced them in court. Working Group. Answer would seem to be that while the registrar would know (from the 54.04(2) list) the identity of such persons, he would have no address for them, whereas presumably the solicitor of parties would have their addresses.

- Williston 54.04(4) specifically required the solicitors to return exhibits to the persons from whose possession they came. While this would seem proper in the case of an exhibit which was produced in court by a non-party, it is a heavy onus (and unnecessary?) re exhibits produced in court by a party. The revised rule deletes this whole clause. Is this wise?

View by Judge or Jury

54.05 The judge or the judge and jury by whom an action is being tried, or the court before whom an appeal is being heard, may, in the presence of the parties or their counsel, [and a court reporter] inspect any ^ property concerning which any question arises in the action, or the place where the cause of action arose, [where such a view may facilitate the understanding of the evidence.]

54.05

- D. Coe pointed out that the closing phrase of Williston 54.05 ("where such a view may facilitate the understanding of the evidence") enshrines in the rule the limited nature and purpose of a view established by one line of existing caselaw. He seems to question the wisdom of so doing. Working Group. Would it be preferable to permit the view to be used to "create" evidence as well as to facilitate an understanding.

Given that today video tapes and movies of locations, machinery and day to day activities of injured parties can be and are adduced in court as evidence, does it make sense to limit the purpose of a view to a mere understanding of the evidence. Would it not be preferable to give the view evidentiary status with the added safeguard of the presence of counsel and a court reporter?

This might be achieved by some such language as "where a view may assist in the determination of the issues". Adding a provision requiring the presence of a court reporter may be both wise and point up the evidence taking nature of the view.

- D. Coe pointed out that 54.05, unlike present R.265, makes no reference to a judge examining a party to determine his sanity. Working Group. Questioning by a judge is perhaps a rather old fashioned way to determine sanity and the preferable route today would be to have a court appointed expert examine the party to determine sanity.

54.05 View by Judge or Jury

The judge, or the judge and jury, by whom any action is being tried, or the court before whom any appeal is being heard, may, in the presence of the parties or their counsel, inspect any real or personal property concerning which any question arises in the action, or the place where the cause of action arose, where such a view may facilitate the understanding of the evidence.

Exclusion of Witnesses

54.06(1) Subject to subrule (2), the trial judge may, and at the request of any party shall, exclude any witness from the courtroom until called to give evidence.

(2) An order under subrule (1) may not be made in respect of a party to the action or a witness whose presence is essential to instruct counsel for the party calling him, but the trial judge may require any such party or witness to give his evidence before any other witnesses are called to give evidence on behalf of that party.

(3) Where an order is made excluding a witness from the courtroom, he shall not have any communication with any witness who has testified during his absence from the courtroom until after the witness so excluded has been called and has given his evidence.

(4) Nothing in this rule prevents the trial judge from excluding any person from the courtroom who is interfering with the proper conduct of the trial or who is otherwise improperly conducting himself.

54.06

- D. Coe noted that present R.253(c), but not 54.06, permits the court to exclude the testimony of any witness who does not comply with an order made under 54.06. Working Group. As D. Coe goes on to point out, failure to comply now appears to go to the weight to be given to the evidence.

54.06 Exclusion of Witnesses

(1) Subject to paragraph (2), the trial judge may, and at the request of any party shall, exclude any witness from the courtroom until called to give evidence.

(2) An order excluding witnesses from the courtroom shall not apply to a party to the action or to any witness whose presence is essential to instruct counsel for the party calling him, but the trial judge may require any such party or witness to give his evidence before any other witnesses are called to give evidence on behalf of that party.

(3) Where an order is made excluding a witness from the courtroom, he shall not have any communication with any witness who has testified during his absence from the courtroom until after the witness so excluded has been called and has given his evidence.

(4) Nothing in this sub-rule shall preclude the trial judge from excluding any person from the courtroom who is interfering with the proper conduct of the trial or who is otherwise improperly conducting himself.

Order of Presentation

54.07(1) On the trial of an action [with a jury], the order of presentation, unless the trial judge directs otherwise, shall be regulated as follows:

1. The plaintiff shall make his opening address first and, subject to paragraph 2, shall then adduce his evidence.
2. A defendant [who undertakes to adduce evidence] may, by leave of the trial judge, make his opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence.
3. When the plaintiff's evidence is concluded, the defendant may make his opening address, unless he has already done so, and shall then adduce his evidence.
4. When the defendant's evidence is concluded, the plaintiff may adduce any proper reply evidence and the defendant shall then make his closing address, followed by the closing address of the plaintiff.
5. Where a defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff shall make his closing address, followed by the closing address of the defendant.

54.07(1)

- Williston Rule 54.07(1) applies to jury trials (as does present Rule 255) but adds that its provisions apply unless the trial judge directs otherwise. With this addition does it make much sense to limit the rule to trials by jury? Since a similar order is followed today in non-jury trials (subject to judicial discretion) why not make the rule apply generally to all trials - at the very least it will be an aid in guiding and informing young lawyers.

54.07(1) 2.

- D. Coe points out that Williston 54.07(1)(b) was unclear as to whether a defendant would have to undertake to call evidence as a condition of being granted leave to open before the plaintiff adduces his evidence. Working Group suggests that the Subcommittee should clear up this issue. If it is felt that the undertaking should be required this could be achieved by specifically including the requirement as set out in square brackets in the revised rule (if this is done we see no reason to retain the "with leave of the trial judge" provision). If it is felt that the defendant should not have to undertake to call evidence then the solution would seem to be to simply delete the "with leave" provision.

54.07 Order of Presentation

(1) On the trial of an action with a jury, the order of presentation, unless otherwise directed by the trial judge, shall be regulated as follows:

- (a) The plaintiff shall be allowed to make his opening address first and, subject to clause (b), immediately thereafter adduce whatever evidence he may wish to call;
- (b) Where the defendant so request, he may, by leave of the trial judge, make his opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence;
- (c) When the evidence adduced on behalf of the plaintiff is concluded, the defendant may make his opening address, unless he has already done so, and then proceed to adduce whatever evidence he may wish to call;
- (d) When the evidence adduced on behalf of the defendant is concluded, the plaintiff may proceed to adduce whatever evidence he may properly call in reply and, at the conclusion thereof, the defendant shall make his closing address followed by the closing address of the plaintiff;
- (e) Where the defendant calls no evidence at the conclusion of the evidence adduced on behalf of the plaintiff, the plaintiff shall make his closing address followed by the closing address of the defendant.

(2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.

(3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.

(4) Where a party is represented by counsel, the right to address the jury shall be exercised by his counsel.

Disagreement of the Jury

54.08(1) Where the jury disagrees, or makes no finding on which judgment can be granted, the trial judge may,

- (a) direct that the action be re-tried at the same sittings by a jury selected from a new panel or at any subsequent sittings; or
- (b) where there is no evidence on which a judgment for the plaintiff could be based or for any other reason he is not entitled to judgment, dismiss the action.

(2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.

(3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.

(4) Where a party is represented by counsel, the right to address the jury shall be exercised by his counsel.

54.08(1)

- Working Group. Williston 54.08(1) was difficult to follow because the general rules (clause (b)) was preceded by the exceptional case (clause (a)) and because clause (a) was unclear as to what it covered (we understand it to be designed basically to cover cases where the judge would have granted a non-suit but for the caselaw which indicates that in a jury trial he should take the jury's verdict before non-suiting a plaintiff). The revised rule reverses the order of clauses (a) and (b) and the new clause (b) has been redrafted in an attempt to make it clearer.

- re revised rule 54.08(1)(a): is it necessary to specify a jury selected from a new panel as opposed to simply a new jury? Will this make an immediate re-trial impossible at small centers? Is this a bad thing?

54.08 Disagreement of the Jury

(1) Where the jury disagrees, or makes no finding upon which judgment can be granted, the trial judge may,

- (a) on the application of the defendant, dismiss the action on the ground that there is no evidence to warrant a judgment for the plaintiff, or that for any other reason he is not entitled to judgment; or
- (b) direct that the action be re-tried at the same sittings by a jury selected from a new panel or at any subsequent sittings.

(2) Where a jury is directed to answer questions and answers some but not all or gives conflicting answers, so that judgment cannot be granted on the findings, the action shall be re-tried as provided in clause 1(a).

(3) Where the answers given by a jury as sufficient to entitle a party to judgment on some but not all of his claims, the judge may direct that judgment be entered on the causes of action as to which the answers are sufficient, and the issues on the remaining causes of action shall be re-tried as provided in clause 1(a).

Omission to Prove a Fact or Document

54.09 Where, through accident, mistake or other cause, a party fails to prove some fact or document material to his case,

- (a) the judge may proceed with the trial subject to the fact or document being afterwards proved at such time and on such terms as he directs, or
- (b) where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on the fact or document being afterwards proved as directed, and, if not so proved, judgment shall be granted to the opposite party, unless the judge directs otherwise.

54.08(2)

- L.R.

54.08(3)

- New. This provision is basically present Ontario R.511(2) (and Nova Scotia 34.15(3)) which was not included in the Williston draft. Working Group suggests it be included for completeness and since there seems to be no reason to exclude it.

54.09

- L.R.

(2) Where a jury is directed to answer questions, and answers some but not all, or where the answers are conflicting so that judgment cannot be granted upon such findings, the action shall be re-tried as in the case of a disagreement.

54.09 Omission to Prove a Fact or Document

Where through accident or mistake or other cause, any party omits or fails to prove some fact or document material to his case,

- (a) the judge may proceed with the trial subject to the fact or document being afterwards proved at such time and upon such terms as he may direct; or
- (b) where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on the fact or document being afterwards proved as directed, and, if not so proved, judgment shall be granted to the opposite party, unless the judge otherwise directs.

Assessment of Damages

54.10 Where damages are to be assessed in respect of,

- (a) a continuing cause of action;
- (b) repeated breaches of recurring obligations;
or
- (c) intermittent breaches of a continuing obligation,

the damages shall be assessed down to the time of assessment, including damages for breaches occurring after the commencement of the proceeding.

54.10 Assessment of Damages

Where damages are to be assessed in respect of,

- (a) any continuing cause of action;
- (b) repeated breaches of recurring obligations; or
- (c) intermittent breaches of a continuing obligation,

the damages shall be assessed down to the time of assessment, including damages for breaches occurring after the commencement of the proceeding.

RULE 55 EVIDENCE AT TRIAL

Evidence by Witnesses

55.01(1) Unless otherwise provided by these rules, witnesses at the trial of an action shall be examined orally in court and the examination shall consist of direct examination, cross-examination and re-examination.

(2) The trial judge shall exercise reasonable control over the mode of interrogation of a witness so as to protect the witness from undue harassment or embarrassment and may disallow any question put to a witness that is vexatious or irrelevant to any matter that may properly be inquired into at the trial.

(3) The trial judge may at any time direct that a witness be recalled for further examination [or cross-examination or both].

RULE 55 EVIDENCE AT TRIAL

55.01(1)

- D. Coe points out that the inclusion in this subrule of the words "under oath" is unnecessary and inaccurate, and he recommends their deletion.
- Present R. 268 focuses on the notion that witnesses should be orally examined in open court, not the type and order of examination (as does Williston 55.01(1)). D. Coe points out that if Williston 55.01(1) remains as it is, then the words "or cross-examination or both" should be added to 55.01(3). Best solution would seem to be to redraft 55.01(1).

RULE 55 EVIDENCE AT TRIAL

55.01 Evidence by Witnesses

(1) Unless otherwise provided by these rules, witnesses at the trial of an action may be orally examined, cross-examined and re-examined under oath.

(2) The trial judge shall exercise reasonable control over the mode of interrogation of a witness so as to protect the witness from undue harassment or embarrassment and may disallow any question put to a witness that is vexatious or irrelevant to any matter which may properly be inquired into at the trial.

(3) The trial judge may at any time direct that a witness be recalled for further examination.

(4) Where a witness appears to be evasive, the trial judge may permit the party calling that witness to examine him by means of leading questions relevant to the matters in issue.

55.01(4)

- The new B.C. Rules have an equivalent provision. Is the wording preferable?

(18) Where a witness appears unwilling or unable to give responsive answers or is hostile, the Court may permit the party calling the witness to examine him by means of leading questions (New.)

(4) Where a witness appears to be evasive, the trial judge may permit the party calling that witness to examine him by means of leading questions relevant to the matters in issue.

55.01(5)

- D. Coe points out that Williston 55.01(5) overlooks the fact that under the Judicature Act s.127(6) (a) trials may be conducted in French or English or both languages. The subrule has been redrafted to take account of this point.
- D. Coe further points out that the rule should refer to "oath or affirmation". Rule 33.11(1) should be similarly amended.

(5) Where a witness does not understand the language in which his examination is to be conducted, or is ^A deaf or mute ^A the party calling the witness shall provide a competent and independent interpreter who, before the witness is called, shall be sworn to interpret accurately the administration of the oath or affirmation, the questions ^A put to the witness and his answers. ^A

(5) Where a witness does not understand the language in which the trial is being conducted, or is a deaf or mute person, it shall be the responsibility of the party calling that witness to provide a competent interpreter who, before the witness is sworn or examined, shall be sworn to accurately interpret the administration of the oath, the questions to be put to the witness and his answers thereto.

Evidence by Affidavit

55.02(1) Before or at the trial of an action, the court may make an order, on such terms as are just, allowing the evidence of a witness to be given by affidavit or a particular fact or document to be proved by affidavit, unless an adverse party requires the attendance of the deponent at trial for cross-examination.

55.02 Evidence by Affidavit

(1) Before or at the trial of an action, the court may make an order, upon such terms as may seem just, allowing the evidence of any witness to be given by affidavit or any particular fact or document to be proved by affidavit, unless an adverse party requires the attendance of the deponent at trial for cross-examination.

(2) Where an order is made under subrule (1) before the trial, it may be set aside or varied by the trial judge where it appears necessary to do so in the interests of justice.

(3) At the trial of an undefended action, the plaintiff may prove his case by affidavit unless the trial judge orders otherwise.

Compelling Attendance at Trial

55.03(1) Where a party requires the attendance of a person in Ontario as a witness at a trial, he may serve him with a summons to witness (Form 55A) requiring him to attend the trial at the time and place stated therein, and the summons may also require him to produce at the trial all documents or other things in his possession [^] or control relating to the matters in question in the action or such documents or other things relating thereto as are specified in the summons.

(2) On the request of a party and on payment of the prescribed fee, a registrar shall issue a blank summons to witness signed by him under the seal of the court and the party [^] may complete the summons and [^] insert [^] the names of any number of witnesses.

(2) Where an order is made under paragraph (1) prior to the trial, it may be revoked or varied by the trial judge where it appears necessary to do so in the interests of justice.

(3) At the trial of an undefended action, the evidence by or on behalf of the plaintiff may be given by affidavit unless, in any particular case, the trial judge requires the plaintiff to call oral evidence.

55.03(1)

- Working Group following the New Brunswick example this rule has been amended so that a witness may be compelled to bring things other than documents.

55.03 Compelling Attendance at Trial

(1) Where a party requires the attendance of any person in Ontario as a witness at a trial, he may serve him with a Summons to Witness (Form 55A) requiring him to attend the trial at the time and place stated therein, and any such summons may also require him to produce at the trial all documents in his possession, custody or control relating to the matters in question in the action or such documents relating thereto as may be particularly specified therein.

(2) On the request of any party, or his solicitor, and on payment of the prescribed fee, a registrar shall issue a Summons to Witness signed by him under the seal of the court and that party or his solicitor shall complete the summons as the circumstances may require and may insert therein the names of any number of witnesses.

(3) No summons to witness for the production of an original record or document that may be proved by a certified copy shall be served without leave of the court.

(4) A summons to witness shall be served personally on the witness and, at the same time, the proper attendance money shall be paid or tendered to him.

(3) No Summons to Witness for the production of an original record or document that may be proved by a certified copy shall be served without leave of the court.

55.03(4)

- D. Coe points out that the combined effect of Williston 55.03(4) and 55.05 is that a party could require the attendance of an adverse party as a witness without tendering conduct money. This could be used unfairly, for example, by a defendant against a non-resident plaintiff. Moreover, present R.274 (the equivalent of Williston 55.05) is both limited to parties who are within the jurisdiction and requires that conduct money be tendered.

What is the best solution? As presently drafted the rules re pretrial oral examinations (33.05(4) and 33.09(2)) say that parties are not entitled to be paid attendance money for discovery and other examinations. This seems reasonable re discovery because each party is obligated to provide discovery to the other side: but there is no obligation to be available as a witness at trial for the other side. The solution would appear to be to change 55.03(4) and 55.05(1) to require attendance money for parties.

What about cross-examination and judgment debtor examinations. Present R.229 (cross-examination) and 344 (other examinations) give

cont'd

(4) A Summons to Witness shall be served by leaving a copy thereof with the witness personally and, unless he is a party, at the same time paying or tendering to him the proper conduct money, and it shall not be necessary for the process server to produce the original or have it in his possession.

no attendance money to a party, even if outside Ontario. Revised Rule 33.05(4) is to the same effect. Is this satisfactory? Working Group. Only difficulty we see is with 39.02 examinations (ie. where a party seeks to examine another party as a witness on a motion or application. The same difficulty as arises at trial could arise particularly with a non-resident party - perhaps re 39.02 examinations parties should be entitled to conduct money (at least if they are outside the jurisdiction).

(5) Service of a summons to witness and the payment or tender of attendance money may be proved by affidavit.

(6) A summons to witness continues to have effect until the conclusion of the sittings for which the attendance of the witness is required.

(7) Where a witness fails to attend at the trial of an action or to remain in attendance in accordance with the requirements of a summons to witness served on him, and the presence of that witness is material to the conduct of the action, the presiding judge may, by warrant (Form 55B) directed to all sheriffs and other peace officers in the Province of Ontario, cause the witness to be apprehended anywhere within Ontario and forthwith brought before the court.

(5) Service of a Summons to Witness and the payment or tender of any conduct money may be proved by affidavit.

(6) A Summons to Witness continues to have effect until the conclusion of the sittings for which the attendance of the witness is required.

55.03(7)

- Williston 55.03(7) has been made into two sub-rules.
- L.R. The phrase "conduct of the action" (in place of the "ends of justice") is borrowed from New Brunswick and seems better.

(7) Where a witness fails to attend at the trial of an action or to remain in attendance in accordance with the requirements of a Summons to Witness duly served upon him, and the presence of that witness is material to the ends of justice, the presiding judge may, by his Warrant (Form 55B) directed to all sheriffs and other peace officers in the Province of Ontario, cause such witness to be apprehended anywhere within Ontario and forthwith brought before the court. Upon being so apprehended, he may be detained in custody until his presence as such witness is no longer required, or released on such terms as the court may order, and he may be ordered to pay the costs arising out of his failure to attend or remain in attendance.

(8) On being apprehended, the witness may be detained in custody until his presence [^] is no longer required, or released on such terms as are just and he may be ordered to pay the costs arising out of his failure to attend or remain in attendance.

Interprovincial Subpoena

55.04 A summons to witness to compel attendance under the Interprovincial Subpoenas Act of a witness outside Ontario shall be in Form 55C.

Compelling Attendance of Witness in Custody

55.05 The court may make an order for attendance of a witness in custody (Form 55D), directing the sheriff, jailer or other officer having the custody of a prisoner to produce him for an examination authorized by these rules or as a witness at a trial.

55.04

- This rule is new to give effect to the Interprovincial Subpoenas Act, 1979.

55.05

- Williston 55.04, renumbered.
- This writ was the only latin name that the Williston Committee did not delete. Since there appears to be no particular reason to retain the latin, the revised rule follows the precedent of New Brunswick and B.C. and deletes it.
- The B.C. rule (see below) is broader and could be used, for example, where the witness is in a mental institution or home. Is it preferable?

(37) The Court may order the attendance of a witness who is in the lawful custody of another person, including the custodian of a penal institution. (ER 54/9.)

55.04 Compelling Attendance of Witness in Custody

The court may order the issue of a Writ of *Habeas Corpus Ad Testificandum* (Form 55C), directing the sheriff, jailer or other officer having the custody of a prisoner, to produce him for any examination authorized by these rules or as a witness at a trial.

Calling Adverse Party as a Witness

55.06(1) A party intending to call as a witness at the trial an adverse party, or an officer, director or sole proprietor of or a partner of an adverse party, may either serve him with a summons to witness or serve on the adverse party or his solicitor, at least ten days before trial, notice of his intention to call him as a witness.

(2) A party may call a witness referred to in subrule (1) without previous notice of payment of attendance money if the witness is in attendance at the trial, unless the witness has already testified or the adverse party or his counsel undertakes to call the witness.

55.06

- Williston 55.05, renumbered.

55.06(1)

- Williston 55.05(1) covered adverse party, director, etc. New Brunswick has added sole proprietor or partner of an adverse party. Is this a good addition? (B.C. goes further and includes "employee or agent of adverse party". Argument against this further extension is that employees are not so closely identified with corporations as are directors and, anyway, 55.01(4) allows cross-examination if a witness is evasive.
- Why retain the additional, separate procedure of a "notice of intention to call an adverse party" etc. Instead it could simply use a Summons to Witness with the option of either serving it on the adverse party, officer, etc. or on the adverse party or his solicitor at least 10 days before trial. (This approach has the added advantage of not requiring the inclusion of a provision for attendance money along with a notice of intention).

55.06(2)

- L.R.

55.05 Calling Adverse Party as a Witness

(1) A party intending to call as a witness at the trial an adverse party, or any officer or director of a corporation that is an adverse party, may either serve him with a Summons to Witness or serve on the adverse party or his solicitor, at least 10 days before trial, notice of his intention to call him as a witness.

(2) A party may call as a witness an adverse party, or any officer or director of a corporation that is an adverse party, in attendance at the trial, unless the adverse party has already testified on his own behalf, or undertakes to do so, or, where the adverse party is a corporation, the officer or director has already testified, or counsel for the corporation undertakes to call him as a witness.

(3) A party calling a witness referred to in subrule (1) may cross-examine him.

(4) If a person required to testify under this rule refuses or neglects to attend at the trial or to remain in attendance at the trial or refuses to be sworn or to answer any proper question put to him or to produce any document or other thing that he is required to produce, the court may pronounce judgment in favour of the party calling the witness, adjourn the trial or make such other order as is just.

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

55.07 Where by these rules evidence is admissible only with leave of the trial judge because a party has failed to make prior disclosure, leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of a trial with a jury.

Setting aside Summons to Witness or Notice to Attend

[55.08 A person served with a summons to witness or a notice under subrule 55.06(1) may move to have it set aside or varied on the ground that he can give no evidence relevant to the issues or that compliance would work a hardship on him.]

55.06(3)

- L.R.

55.07

- New. Added to implement decision recorded at pp. 170 to 171 of memoranda of meetings. See also p. 182 of three column.

55.08

- New. This provision was added in New Brunswick. Is it a useful addition?

(3) A party calling an adverse party, or any officer or director of a corporation that is an adverse party, as a witness, may cross-examine him.

(4) If a person required to testify pursuant to this sub-rule refuses or neglects to attend at the trial or to remain in attendance at the trial or refuses to be sworn or to answer any proper question put to him or to produce any document which he is required to produce, the court may pronounce judgment in favour of the party calling that witness, adjourn the trial, or make such other order as may seem just.

DISCOUNT RATE FOR FUTURE PECUNIARY DAMAGES

55.09 The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is two and one-half per cent per year.

55.09

- New. Revised version of present rule 267a, added at suggestion of J.W. Morden.

